

**FALL 2020**  
**NEW YORK UNIVERSITY**  
**SCHOOL OF LAW**

“Illusions of Justice in International Taxation.”

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**September 15, 2020**

Via Zoom

Time: 2:00 – 3:50 p.m. EST

Week 4

## **SCHEDULE FOR FALL 2020 NYU TAX POLICY COLLOQUIUM**

(All sessions meet online on Tuesdays, from 2:00 to 3:50 pm EST)

1. Tuesday, August 25 – Steven Dean, NYU Law School. “A Constitutional Moment in Cross-Border Taxation.”
2. Tuesday, September 1 – Clinton Wallace, University of South Carolina School of Law. “Democratic Justice in Tax Policymaking.”
3. Tuesday, September 8 – Natasha Sarin, University of Pennsylvania Law School. “Understanding the Revenue Potential of Tax Compliance Investments.”
4. Tuesday, September 15 – Adam Kern, Princeton Politics Department and NYU Law School. “Illusions of Justice in International Taxation.”
5. Tuesday, September 22 – Henrik Kleven, Princeton Economics Department. “The EITC and the Extensive Margin: A Reappraisal.”
6. Tuesday, September 29 – Leandra Lederman, Indiana University Maurer School of Law. “Of Risks and Remedies: Best Practices in Tax Rulings Transparency.”
7. Tuesday, October 6 – Daniel Shaviro, NYU Law School. “What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?”
8. Tuesday, October 13 – Steve Rosenthal, Urban-Brookings Tax Policy Center. “Tax Implications of the Shifting Ownership of U.S. Stock.”
9. Tuesday, October 20 – Michelle Layser, University of Illinois College of Law. “How Place-Based Tax Incentives Can Reduce Economic Inequality.”
10. Tuesday, October 27 – Gabriel Zucman, University of California, Berkeley. “The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts.”
11. Tuesday, November 10 – Owen Zidar, Princeton Economics Department. “The Tax Elasticity of Capital Gains and Revenue-Maximizing Rates.”
12. Tuesday, November 17 – Abdoulaye Ndiaye, NYU Stern Business School. “Redistribution With Performance Pay.”
13. Tuesday, November 24 – Lilian Faulhaber, Georgetown Law School. “Searching for Coherence: The Overuse of Excess Returns and Excess Profits.”
14. Tuesday, December 1 – Erin Scharff, Arizona State Sandra Day O’Connor College of Law. “Revisiting Local Income Taxes.”

**To:** NYU Colloquium on Tax Policy and Public Finance  
**From:** Adam Kern

Dear Colleagues,

I am presenting the first chapter from my dissertation-in-progress, *Principles of International Taxation*. Attached is a standalone version of that chapter.

Simplifying a bit, the dissertation argues that taxing rights should be assigned not so as to match the boundaries of political communities, but so as to achieve the fairest feasible distribution of social advantages among individuals.

Much of my dissertation builds upon arguments that I make in the first chapter. As you'll see, this chapter criticizes an extremely pervasive idea that has shaped international tax policy since the 1920s. According to that idea, which I call the "Capture Principle," each state should have rights to tax income generated from economic activities within its territory, rights whose value scales in proportion to the income generated from the hosted economic activities. My arguments against the Capture Principle also cast doubt on a second prominent idea about international tax policy, which I call the "Affiliation Principle," according to which each state should have rights to tax the worldwide income earned by all and only the members of its political community. My practical conclusions build on this critical work. Your feedback will help me to develop all of these ideas.

To give you a sense for my broader project, here is the dissertation's table of contents:

**Part 1: The Traditional Approach to International Taxation**

**Chapter 1: The Capture Principle**

**Chapter 2: The Affiliation Principle**

**Part 2: Refining Broad Egalitarianism**

**Chapter 3: Universal Statism**

**Part 3: Practical Applications**

**Chapter 4: Distributing Corporate Rents**

**Chapter 5: Taxing Expatriates: A Forward-Looking Rationale**

I am extremely grateful for your attention to my work.

Adam Kern

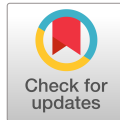
## Illusions of Justice in International Taxation

Adam Kern  
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September 2020

**Abstract:** I criticize a common way of thinking about justice in international taxation, and I propose an alternative. My critical target is a claim I call the Capture Principle. Common ground among many government officials, leading tax scholars, and several of the few philosophers who have thought about international taxation, the Capture Principle asserts that each state should have rights to tax income generated from economic activities within its territory, rights whose value scales in proportion to the income generated from the hosted economic activities.

The Capture Principle appears to embody an ideal of reciprocity. I argue that this appearance is illusory. I examine three arguments that connect those two ideas, and I show that each fails on its own terms. Even if we ought not to free-ride off others, ought to pay compensation for the burdens we place on others' public sectors, ought to reward people for the surplus value that they create—the Capture Principle does not follow. This critical work reveals an interesting new research agenda for thinking about justice in international taxation.



ADAM KERN 

## Illusions of Justice in International Taxation

There's an old adage that public finance amounts to "so plucking the goose as to obtain the largest amount of feathers with the least amount of hissing."<sup>1</sup> In our time, the plumpest birds roam free. By fanning out across the globe and engaging in sophisticated—and legal—tax-planning strategies, household-name corporations have been able to pay tax at shockingly low effective rates. For example, in 2014, for every \$1,000,000 of profit that Apple earned from its European operations, it paid \$50 in tax: a rate of 0.005 percent.<sup>2</sup> Partly because of these schemes, states around the world have struggled to tax capital.<sup>3</sup> The consequences for how people live are enormous.

Thanks to Colin Bradley, Shuk Ying Chan, Mala Chatterjee, Greg Conti, Ryan Fackler, Ethan Herenstein, Christine Hobden, Natalie Jacewicz, David Kamin, Sonny Kim, Daryl Levinson, Steve Macedo, Erin Miller, Jan-Werner Müller, Jake Nebel, Kristi Olson, Ketan Ramakrishnan, Erick Sam, Dan Shaviro, Johan Trovik, Annette Zimmermann, and the editors of *Philosophy & Public Affairs* for helpful comments. Special thanks to Chuck Beitz, Mitchell Kane, Liam Murphy, Alan Patten, and Annie Stilz for advising me throughout the course of this project.

1. Attributed to Jean-Baptiste Colbert, Finance Minister to King Louis XIV of France. See, e.g., Sven Steinmo, *Taxation and Democracy* (New Haven: Yale University Press, 1993), p. 19.

2. See Edward Kleinbard, "Apple's Ireland Tax Avoidance Should Spur Major Reforms," *The Hill*, September 6, 2014, <https://thehill.com/blogs/pundits-blog/finance/294453-apples-ireland-tax-avoidance-should-spur-major-reforms>.

3. See, e.g., Kimberly Clausing, "The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond," *National Tax Journal* 69 (2014): 905–34; Dhammika Dharmapala, "What Do We Know about Base Erosion and Profit Shifting? A Review of the Empirical Literature," *Fiscal Studies* 35 (2014): 421–48; David Bradbury, Tibor Hanappi, and Anne Moore, "Estimating the Fiscal Effects of Base Erosion and Profit Shifting: Data and Analytical Issues," *Transnational Corporations* 25 (2018): 91–106; Sarah Clifford, "Taxing Multinationals Beyond Borders: Financial and Locational Responses to CFC Rules," *Journal of Public Economics* 173 (2019): 44–71; Thomas Tørsløv, Ludwig Wier, and Gabriel Zucman, "The Missing Profits of Nations" (unpublished manuscript); Jennifer Blouin and Leslie Robinson, "Double Counting Accounting: How Much Profit of Multinationals is Really in Tax Havens?" (unpublished manuscript).

There is some evidence that these schemes hurt developing countries more than developed ones. See Ernesto Crivelli, Michael Keen, and Ruud de Mooij, "Base Erosion, Profit Shifting, and Developing Countries," *FinanzArchiv* 72 (2016): 268–301. See also Clemens

Apple and other enterprises have achieved such results by maneuvering within international tax law. This legal regime includes a network of about 3,000 bilateral treaties,<sup>4</sup> a few multilateral instruments,<sup>5</sup> and domestic law from states around the world. An important function of international tax law is to determine which states may tax what, and how. The law, in other words, allocates *taxing rights* across states. Since the 1920s, taxing rights have been assigned according to two concepts: source and residence.<sup>6</sup> Source, roughly put, allocates taxing rights to states where production occurs; residence allocates taxing rights to states where taxpayers “live.”<sup>7</sup> Many tax-avoidance techniques work by exploiting how the law artificially deploys these concepts.<sup>8</sup> For example, one might incorporate a business in a tax haven so that it is deemed to reside in that haven, even if the business operates entirely elsewhere.<sup>9</sup>

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Fuest, Shafik Hebous, and Nadine Riedel, “International Debt Shifting and Multinational Firms in Developing Economies,” *Economics Letters* 113 (2011): 135–38; Clemens Fuest, Shafik Hebous, and Nadine Riedel, “International Profit Shifting and Multinational Firms in Developing Economies,” in *Critical Issues in Taxation and Development*, eds. Clemens Fuest and George R. Zodrow (Cambridge: MIT Press, 2013), pp. 145–66. But see Tørsløv, Wier, and Zucman, “The Missing Profits of Nations.”

4. For the number, see Elliot Ash and Omri Marian, “The Making of International Tax Law: Empirical Evidence from Natural Language Processing” (unpublished manuscript).

5. See, e.g., OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (2018).

6. It is somewhat ambiguous to what extent countries have the right to tax *non-resident* citizens on income that they derive from activities abroad. The United States, famously, taxes nonresident citizens on this income—but it does so in a highly circumscribed fashion, and arguably it is the only country that does. See Daniel Shaviro, “Taxing Potential Community Members’ Foreign Source Income,” *Tax Law Review* 70 (2016), p. 80. Eritrea, which imposes a flat 2 percent tax on nonresident citizens abroad, is the sole other possible exception. Shaviro and Ruth Mason, however, think that Eritrea belongs in a different category from the United States, since only the United States subjects its nonresident citizens to taxes at the same progressive rates that apply to residents. *Ibid.*; Ruth Mason, “Citizenship Taxation,” *Southern California Law Review* 89 (2016): 169–240, at p. 172 ff.

7. The scare quotes are necessary because corporations are taxpayers, and strictly speaking they don’t live.

8. See Mitchell Kane, “A Defense of Source Rules in International Taxation,” *Yale Journal on Regulation* 32 (2015): 311–61, at pp. 312–14; see also Julie Roin, “Inversions, Related Party Expenditures, and Source Taxation,” *BYU Law Review* 2016 (2016): 1838–92.

9. This strategy is possible under U.S. law, which defines corporations to reside in the state under whose laws they were created and organized. See I.R.C. § 7701(a)(4)–(5). For discussion of this strategy’s costs and benefits to the taxpayer, see Mitchell Kane and Edward Rock, “Corporate Taxation and International Charter Competition,” *Michigan Law Review* 106 (2008): 1230–84; David Schizer, “Between Scylla and Charybdis: Taxing Corporations or Shareholders (or Both),” *Columbia Law Review* 116 (2016): 1849–914, at pp. 1868–70.

Proposals for international tax reform are as intricate and varied as the schemes that they seek to end. Many of these proposals, however, share a common aspiration. That goal is to give states rights to tax economic activities that occur within their borders and to scale the scope of those rights in proportion to how much income is derived from those activities. Proposals to shore up source-based taxation clearly work toward this goal, for such proposals would enable states to more fully tax *productive* activities that they host.<sup>10</sup> But we can see the aspiration at work in more exotic possibilities as well. Under destination-based tax regimes, states would have rights to tax income generated from the *consumption* of goods and services within their borders.<sup>11</sup> Similarly, under formulary apportionment, rights to tax corporate income would be allocated in proportion to the location of various aspects of each corporation's operations, such as employees, assets, and sales.<sup>12</sup> Such metrics tend to be designed to "provide a crude yet sensible proxy to the location of the income-generating activities associated with the relevant source of income [they] seek . . . to allocate."<sup>13</sup> To be sure, not all reforms would give states the right to tax economic activities that they host.<sup>14</sup> But those proposals have not received nearly as much attention, in the houses of government and the pages of journals, as the ones that would.

10. Such as Kane's proposal in "A Defense of Source Rules."

11. Destination-based taxes have been championed by subsets of the Oxford International Tax Working Group, whose members include Michael Devereux, Alan Auerbach, Michael Keen, Paul Oosterhuis, Wolfgang Schön, and John Vella. See, for example, Michael Devereux and John Vella, "Are We Heading Towards a Corporate Tax System Fit for the 21<sup>st</sup> Century?" *Fiscal Studies* 35 (2014): 449-75; Michael Devereux and John Vella, "Gaming Destination-Based Cash Flow Taxes," *Tax Law Review* 71 (2018): 477-514; Auerbach et al., "Destination-Based Cash Flow Taxation" (unpublished manuscript); Devereux et al., "Residual Profit Allocation by Income" (unpublished manuscript).

12. Advocates of various formulary apportionment schemes include Reuven Avi-Yonah, Kimberley Clausing, Michael Durst, Ilan Benshalom, Peter Dietsch, and Thomas Rixen. See, e.g., Reuven S. Avi-Yonah, Kimberly A. Clausing, and Michael C. Durst, "Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split," *Florida Tax Review* 9 (2009): 497-53; Reuven S. Avi-Yonah and Ilan Benshalom, "Formulary Apportionment: Myths and Prospects," *World Tax Journal* (2011): 371-98; Peter Dietsch and Thomas Rixen, "Tax Competition and Global Background Justice," *The Journal of Political Philosophy* 22 (2014): 150-77.

13. Avi-Yonah and Benshalom, "Formulary Apportionment," p. 385.

14. See, e.g., Wei Cui, "Residence-Based Formulary Apportionment: (In)feasibility and Implications," *Tax Law Review* 71 (2018): 551-82.

That is no coincidence. It's taken for granted that states which host economic activity should have rights to tax it. In 1918, T.S. Adams, one of the architects of the international tax regime, argued that each state has a "prior claim . . . upon profits which public expenditures or the business environment maintained by the state have in part produced."<sup>15</sup> Almost exactly a century later, policymakers at the OECD organized their project on base erosion and profit-shifting around the principle that profits ought to be taxed "where value is created."<sup>16</sup> A wide range of leading tax scholars have expressed similar thoughts,<sup>17</sup> as have several of the few philosophers who have thought about international taxation.<sup>18</sup> All in all, Steven Dean reports, "Even those who agree on nothing else when it comes to international taxation would likely agree that each state should be entitled to revenues derived from economic activity that occurs within its borders."<sup>19</sup>

15. T.S. Adams, "Federal Taxes Upon Income and Excess Profits," *American Economic Review* 8 (1918): 18–35, at p. 20. Several of his contemporaries expressed similar thoughts. See, e.g., Stanley I. Langbein, "The Unitary Method and the Myth of Arm's Length," *Tax Notes* 30 (1986): 625–74, at p. 632 (ascribing such thoughts to Mitchell B. Carroll).

16. OECD, *BEPS Action Plan* (2013).

17. See Richard and Peggy Musgrave, "Inter-Nation Equity," in *Modern Fiscal Issues*, eds. R.M. Bird and J.G. Head (Toronto: University of Toronto Press, 1972), pp. 63–85; Richard Musgrave, "Foreword," in *Income Taxation and International Mobility*, eds. Jagdish Bhagwati and James D. Wilson (Cambridge: MIT Press, 1989), pp. xi–xvii, at xii; Michael J. Graetz, "Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies," *Tax Law Review* 54 (2001): 261–336, at pp. 297–98; Stephen Shay, J. Clifton Fleming, and Robert J. Peroni, "What's Source Got to Do With It?" *Tax Law Review* 56 (2002): 81–155, at pp. 90–92; Julie Roin, "Can the Income Tax Be Saved?" *Tax Law Review* 61 (2008): 169–240, at p. 195; Avi-Yonah and Benshalom, "Formulary Apportionment: Myths and Prospects," p. 385; Wei Cui, "The Digital Services Tax: A Conceptual Defense," *Tax Law Review* 73 (forthcoming); Devereaux et al., "Residual Profit Allocation by Income", p. 15; Wolfgang Schön, "One Answer to Why and How to Tax the Digitalized Economy" (unpublished manuscript). The idea is also implicit in Lawrence Lokken's discussion of how to source income from intellectual property. Lawrence Lokken, "The Sources of Income from International Uses and Dispositions of Intellectual Property," *Tax Law Review* 36 (1981): 233–339, at pp. 240–42.

18. See Peter Dietsch, "Whose Tax Base? The Ethics of Global Tax Governance," in *Global Tax Governance: What is Wrong With It and How to Fix It*, eds. Peter Dietsch and Thomas Rixen (London: ECPR Press, 2016), pp. 231–51; Dietsch and Rixen, "Tax Competition and Global Background Justice"; Andreas Cassee, "International Tax Competition and Justice: The Case for Global Minimum Tax Rates," *Politics, Philosophy & Economics* 18 (2019): 242–63, at pp. 247–48; Mathias Risse and Marco Meyer, "Tax Competition and Global Interdependence," *The Journal of Political Philosophy* 27 (2019): 480–98, at pp. 488–89, 495. It's worth noting that Murphy and Nagel's *The Myth of Ownership* explicitly avoids discussing international taxation. *Ibid.*, p. 41 ff.

19. Steven A. Dean, "More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime," *Tulane Law Review* 84 (2009): 125–64, at p. 162.



In context, these thinkers are fairly read to express the somewhat more precise aspiration that I mentioned earlier: that is, to *scale* certain taxing rights in proportion to the income generated from economic activities within each state's territory. I will call their common thought the Capture Principle, and I will restate it as follows:

**Capture Principle:** Each state ought to have a package of rights,  $R_i$ , to tax income generated from economic activities within its borders. The value of  $R_i$  ought to be proportionate to the amount of income generated from the economic activities hosted by  $i$ .

The Capture Principle has enjoyed such enduring and widespread support because it seems to embody an ideal of reciprocity. Roughly put, the basic idea is that, when some people sacrifice to make another's prosperity possible, they are entitled to share in her good fortune. Moreover, the thought continues, people do precisely that for the market participants whom they host. Apple would not be so profitable if ordinary Germans, through the arms of their state, did not protect its stores, enforce its intellectual property, and, more generally, set up a market in which there is intense and specific demand for Apple's products. As we will see, different tax scholars and philosophers emphasize different aspects of reciprocity: some invoke fair play, others compensation, still others contribution. But the guiding thought, rooting the Capture Principle in reciprocity, has been a mainstay of international tax from the field's birth to the present day.

In this article, I will argue that the apparent connection between reciprocity and the Capture Principle is an illusion. I will examine three of the most prominent and plausible ways to connect these two ideas; each, I will argue, fails on its own terms. Even if we ought not to free-ride off others, ought to pay compensation for the burdens we place on others' public sectors, ought to reward people for the surplus value that they create—the Capture Principle does not follow. The critical work of this article is important in its own right, since, if it succeeds, it shows that a central organizing principle for an important and undertheorized aspect of the global order is far less plausible than it looks. At the same time, my arguments also help to reveal a new agenda for thinking about justice in international taxation.

After some preliminaries (Section I), I examine the first argument for the Capture Principle (Section II). This argument appeals to the Principle

of Fair Play. It says that states must have rights to tax the economic activities that they host in order to enforce the moral prohibition on free-riding. This argument taps the intuition that market participants who reap profits from operating within a state, but then pay little in tax, do wrong by free-riding off the sacrifices of the people of that state. I will show, however, that this argument conflates two issues in the morality of cooperation. The Principle of Fair Play asserts that, when we benefit from a cooperative scheme, we are required to play our parts to maintain that scheme. But the Principle of Fair Play does not determine which parts we ought to play. And the definition of market participants' roles—whether they ought to pay relatively more or less in tax; what their tax liabilities should be based on; and so on—is *exactly* what's at stake when we deliberate about how to structure the international tax regime. So the Principle of Fair Play does not support one allocation of taxing rights over another.

In Sections III and IV, I examine two arguments that attempt to ground the Capture Principle in more substantive principles of justice. The first asserts that people ought to be *compensated* for the burdens that market participants place on their public sector. The second asserts that people are owed a proportionate return on their *contributions* to the global economic surplus. I will show that both arguments fail in the same way: the Capture Principle fits poorly with the underlying aims that these arguments invoke. We could do at least as well, as far as compensation and contribution go, by implementing a wide range of alternative international tax regimes.

If my arguments in Sections II-IV are sound, we need a new approach to thinking about justice in international taxation. In Section V, I outline one. Roughly put, my approach identifies how taxing rights can be evaluated as instruments for achieving relatively abstract distributive patterns.<sup>20</sup> Many difficult philosophical and empirical questions need to be answered

20. My approach is similar to what Alexander Cappelen calls "the assignment approach" to the allocation of taxing rights, according to which taxing rights ought to be assigned so as to "maximize some general moral objective: for example, to maximize total welfare." See "The Moral Rationale for International Fiscal Law," *Ethics & International Affairs* 15 (2001): 97-110, at pp. 107-09. Cappelen, however, claims that the assignment approach assumes that "we have the same distributive obligations toward every human being independent of the relationship we have to them." *Ibid.*, p. 107. I do not agree. One can believe that taxing rights ought to be assigned—as far as justice is concerned—so as to achieve relatively abstract distributive patterns, even if one also believes that the content and the normative significance of such patterns are grounded in particular relations that people bear to one another.

in order to derive practical implications from this approach. But, as I note in this article's conclusion, one possible implication is that it is not necessarily unjust for states to lack proportionate opportunities to tax income derived from the economic activities that they host. We should seriously consider assigning taxing rights to states that appear to have had no direct role in the creation of particular items of income.

#### I. CLARIFICATIONS

##### *A. The Concept of Taxing Rights*

International tax law assigns taxing rights to states. When I say "taxing right," I mean an aggregate of legal or conventional rights, the most important incident of which is:

State *A* has a claim against state *B*, with respect to some item, that *B* (not) tax that item at some range of rates.<sup>21</sup>

In the current international tax regime, rights to tax income are allocated to source jurisdictions and residence jurisdictions. These rights are relatively exclusive.<sup>22</sup> For any given item of income, either (a) the source jurisdiction, (b) the residence jurisdiction, or (c) both have rights against all other states that those states not levy tax on that item of income—at any positive rate.

##### *B. Two Kinds of Normative Considerations in International Taxation*

International tax law attempts to resolve conflicts like this:

*Source-Residence Conflict:* A Parisian acquires a restaurant in New York. She receives gains when the restaurant realizes a profit and pays out expenses when it realizes a loss.

21. This is a Hohfeldian claim-right. See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 16-59.

22. These rights aren't always *fully* exclusive, because both the residence jurisdiction and the source jurisdiction are permitted to tax certain items of income.

In this case, multiple states might attempt to tax the Parisian's income. Properly assigning taxing rights among them is important for at least two kinds of reasons.

The first kind of reasons are based in justice. Justice at least partially concerns the distribution of various means to living a good life—including income, wealth, liberties, and other social advantages—and taxing rights influence how such advantages are distributed across the globe.<sup>23</sup> First, they influence how goods are produced through economic exchange.<sup>24</sup> Taxes affect private behavior: a New York restaurant, for example, might be an attractive investment if income derived from it is taxed at a 10 percent rate but not if such income is taxed at a 20 percent rate. By constraining taxes, taxing rights affect which opportunities are available at the market and which bundles of goods are available for consumption. Second, taxing rights influence the public provision of goods. The goods that governments produce are, in part, a function of their budgets, which in turn are partially determined by the taxes available to them. Finally, taxing rights influence the redistribution of goods that are produced through economic exchange.<sup>25</sup> Suppose, for example, that the Parisian restaurateur earns \$1,000,000 in income from her business, and the revenue-maximizing tax burden on this income is \$500,000. Particular allocations of taxing rights make particular distributions of the \$500,000 more or less probable.

The second kind of reasons are based in legitimacy. "Legitimacy," as I use the term here, concerns *procedural* claims that subjects have

23. For this rough definition of distributive justice, see Jonathan Quong, "Consequentialism, Deontology, Contractualism, and Equality," in *The Oxford Handbook of Distributive Justice*, ed. Serena Olsaretti (Oxford: Oxford University Press, 2018), pp. 306–26, at p. 306.

24. There is a large literature on various criteria for evaluating the efficiency of international tax law. See, e.g., Peggy Richman, *Taxation of Foreign Investment Income: An Economic Analysis* (Baltimore: Johns Hopkins Press, 1963); Mihir Desai and James Hines, "Evaluating International Tax Reform," *National Tax Journal* 56 (2003): 487–502; Mihir Desai and James Hines, "Old Rules and New Realities: Corporate Tax Policy in a Global Setting," *National Tax Journal* 57 (2004): 937–60; Daniel Shaviro, *Fixing U.S. International Taxation* (Oxford: Oxford University Press, 2014), Chap. 4; David Weisbach, "The Use of Neutralities in International Tax Policy," *National Tax Journal* 68 (2015): 635–51.

25. See, e.g., Richard and Peggy Musgrave, "Inter-Nation Equity"; Ilan Benshalom, "How to Redistribute? A Critical Examination of Mechanisms to Promote Global Wealth Redistribution," *University of Toronto Law Journal* 64 (2014): 317–58, at pp. 331–33; Kane, "Defense," p. 333; Vincent Arel-Bundock, "The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy," *International Organization* 71 (2017): 349–71, at p. 353.

against the exercise of political rule.<sup>26</sup> It is commonly thought that subjects have moral claims against how political rule is exercised, even if their rulers provide them with the best possible distribution of means to living a good life.<sup>27</sup> These claims, which constitute much of the concept of legitimacy,<sup>28</sup> are at stake in international tax law because international tax law concerns *who* will tax what, and states have different procedural credentials relative to particular people and particular issues. For example, many would find it at least somewhat objectionable if Namibia had the right to tax the Parisian restaurateur on her business income, even if they conceded that exercising this right would improve the global distribution of economic resources. They might try to justify this intuition by claiming that any Namibian tax would wrong the Parisian herself, for she would suffer under “taxation without representation,”<sup>29</sup> would be coerced by a political authority to which she has not consented, or something of that sort. Alternatively, or additionally, they might claim the Namibian right would wrong Americans or the French, for they would be denied a morally significant opportunity to shape their social environments.<sup>30</sup>

26. For this formulation, see Philip Pettit, *On the People's Terms* (Oxford: Oxford University Press, 2014), p. 141; Zofia Stemplowska and Adam Swift, “Dethroning Democratic Legitimacy,” *Oxford Studies in Political Philosophy* 4 (2018): 3–26, at pp. 4–5.

27. For this gloss on legitimacy, see Niko Kolodny, “Political Rule and its Discontents,” *Oxford Studies in Political Philosophy* 2 (2016): 35–67, at p. 36.

28. I don't mean to deny that there could be other aspects of the legitimacy as well, such as a Hohfeldian power to issue content-independent duties, or an immunity to certain compensatory claims. For the former idea, see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 23–69; for the latter, see Daniel Viehoff, “Legitimacy as a Right to Err,” in *NOMOS LXI: Political Legitimacy* (New York: NYU Press, 2019), pp. 174–200.

29. See, e.g., Dietsch, “The Ethics of Global Tax Governance,” p. 237. The philosophical literature on democratic legitimacy is vast. For some important recent contributions, see David Estlund, *Democratic Authority* (Oxford: Oxford University Press, 2008); Niko Kolodny, “Rule Over None I,” *Philosophy & Public Affairs* 43 (2014): 195–229; Niko Kolodny, “Rule Over None II,” *Philosophy & Public Affairs* 42 (2014): 287–336; Daniel Viehoff, “Democratic Equality and Political Authority,” *Philosophy & Public Affairs* 42 (2014): 337–75; Stemplowska and Swift, “Dethroning Democratic Legitimacy.”

30. This is one way of interpreting Peter Dietsch. See Dietsch and Rixen, “Tax Competition and Global Background Justice”; Peter Dietsch, *Catching Capital* (Oxford: Oxford University Press, 2015); Peter Dietsch, “The State and Tax Competition: A Normative Perspective,” in *Taxation: Philosophical Perspectives*, eds. Martin O'Neill and Shepley Orr (Oxford: Oxford University Press, 2016), pp. 203–23. There is a large philosophical discussion of collective self-determination. For a selective sampling, see Michael Walzer, “The Moral Standing of States,” *Philosophy & Public Affairs* 9 (1980): 209–29; David Miller, *On Nationality* (Oxford: Oxford University Press, 1997); David Miller, “Territorial Rights: Concept and Justification,” *Political Studies* 60 (2012): 252–68; Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012); Anna Stilz, *Territorial Sovereignty* (Oxford: Oxford University Press, 2019).

In this article, I am going to evaluate arguments for the Capture Principle that appeal to conceptions of justice. I am focusing on justice because it is important, and because the best arguments for the Capture Principle invoke it.

## II. FAIR PLAY

Many philosophers believe that the Capture Principle is grounded in the Principle of Fair Play, which, roughly speaking, prohibits free-riding.<sup>31,32</sup> For example, Peter Dietsch claims:

One has a duty to contribute to the public goods and to fiscal redistribution wherever one is part of the economic nexus, that is, where one conducts one's economic activities such as work, production, consumption and so on. Why? Both individuals and [multinational enterprises] are part of a cooperative venture. In order to make this venture possible, some public goods and infrastructure are necessary. If you are part of the economic nexus, you benefit from these and, thereby, incur an obligation to contribute to financing them.<sup>33</sup>

Though this passage is susceptible to multiple interpretations, fair play seems to be what Dietsch has in mind. Elsewhere, Dietsch (along with his co-author, Thomas Rixen) draws an extended analogy between multinational tax-avoidance and illicitly entering a high-end health club by flashing a card associated with a no-frills club.<sup>34</sup> Relying on this analogy,

31. Dietsch and Rixen, "Tax Competition and Global Background Justice," pp. 157-58; Dietsch, "Whose Tax Base?" at p. 236; Cassee, "International Tax Competition and Justice," pp. 246-48; Risse and Meyer, "Tax Competition and Global Interdependence," pp. 488-89, 495.

32. There is a large philosophical literature on the content of the Principle of Fair Play. One major axis of disagreement is whether benefits must be voluntarily accepted in order for the principle to apply. Compare Rawls, *A Theory of Justice*, revised edition (Cambridge: Harvard University Press, 1999), pp. 96-98 (yes), with Richard Arneson, "The Principle of Fairness and Free-Rider Problems," *Ethics* 92 (1982): 616-33 at p. 622 (no), and Garrett Cullity, "Moral Free Riding," *Philosophy & Public Affairs* 24 (1995): 3-34, at pp. 8-13 (no). A second point of debate concerns whether the convention must be reasonably just for one to have a moral obligation to comply. Compare Rawls, *A Theory of Justice*, pp. 96-98 (yes), Arneson, "Fairness," p. 620 (yes), and Cullity, "Moral Free Riding," p. 14 (yes), with A. John Simmons, "The Principle of Fair Play," *Philosophy & Public Affairs* 8 (1979): 307-37, at pp. 314-16 (no).

33. Dietsch, "Whose Tax Base?" at p. 236.

34. Dietsch and Rixen, "Tax Competition and Global Background Justice," pp. 157-58.

Dietsch claims that the international tax regime ought to require businesses to pay tax where their economic activities occur.<sup>35</sup> Mathias Risse and Marco Meyer concur. They justify the same claim by saying, "It is a matter of fair play for [market participants] to contribute appropriately."<sup>36</sup>

At the first glance, this argument looks sound. It is a core aspect of common-sense morality that we ought not to free-ride off the contributions of others. Moreover, this obligation appears to imply the Capture Principle. When a foreign investor constructs a factory somewhere, sends goods down the pikes, and then doesn't pay taxes to maintain them, she seems (literally) to be a free-rider. Allocating taxing rights according to the Capture Principle enables states to enforce our obligations not to act in this way.

But this argument, at Rawls pointed out, conflates two distinct issues in the morality of cooperation.<sup>37</sup> One issue is how to orchestrate cooperation in the best possible way. What part should each person play? How should the benefits and burdens of cooperation be distributed among the players? The second issue is whether people have a moral obligation to play the parts that have been laid out for them. In order to justify the Capture Principle, Dietsch, Rixen, Risse, and Meyer need to make a claim regarding the first issue. They need to assert that certain people (market participants) ought to perform certain actions (pay taxes in proportion to their income) to maintain certain cooperative schemes (host states). But the Principle of Fair Play does not bear upon that issue; it bears only upon the second one. The immorality of free-riding does not, by itself, determine which actions each person ought to perform in order to maintain any given cooperative scheme.

The main premise in my argument is that the Principle of Fair Play does not determine which roles people ought to play in the maintenance of particular cooperative schemes. For an illustration, consider the following example:

*The Subway:* We are deciding how to organize a subway system. We are considering two options:

FLAT FEE: Every passenger is required to obey certain conventional norms of conduct while on a train. Every passenger is also required to pay \$2 per trip.

35. Ibid. For this gloss on what Dietsch and Rixen call the "Membership Principle," see *ibid.*, p. 159.

36. Risse and Meyer, "Tax Competition and Global Interdependence," p. 495.

37. Rawls, *A Theory of Justice*, p. 96.

SUBSIDY: The same norms of ridership apply. Meanwhile, a fixed number of free fare cards are passed out to the city's least advantaged residents. All other passengers must pay \$2.50 per trip.

Subsidy results in a more equal distribution of benefits and burdens among residents of the city. That fact (let's assume) provides us with a strong reason to choose it. Does the Principle of Fair Play provide us with any countervailing reason to choose the Flat Fee? It seems not. Under Subsidy, the people who use the free fare cards discharge their obligations under the Principle of Fair Play. They perform their prescribed roles in maintaining the subway; they observe the norms of ridership. Of course, one might well believe that their roles should be different—that, perhaps, they ought to pay some money as well. In order to justify that belief, though, one cannot appeal to the mere fact that the subsidized passengers ride the subway. Instead, one needs to invoke some principle about how the benefits and burdens of the subway system ought to be distributed. One needs, in other words, a principle that is different from Fair Play.

If this understanding of the Principle of Fair Play is correct, Fair Play does not imply the Capture Principle. When we assign taxing rights to states, we assign powers to define particular roles in maintaining different cooperative schemes. Since the Principle of Fair Play is indifferent as to what those roles should be, however, it provides no reason to enable any particular state to define those roles in any particular way. Thus, the Principle of Fair Play provides no reason to give host states the power to impose taxes on the market participants that they host—let alone taxes that scale with the income those participants earn while visiting.

My argument is compatible with the intuition that market participants who operate in states, but then pay hardly any tax to them, do wrong by free-riding.<sup>38</sup> It is a separate issue whether people have moral obligations to comply with the terms of a cooperative scheme, once that scheme is in place. Given that the legal and conventional norms of host states are set up as they are, members of those states might have legitimate expectations that market participants pay substantial amounts of tax to

38. That said, it is also compatible with the claim that they do not do wrong. One might think that, insofar as tax-avoidance strategies comply with the legal rules of host states, those schemes satisfy whatever legitimate expectations members of those states have. I do not take a stand on this issue. What I want to emphasize is that my argument is compatible with either position on it.



them. These expectations could imply, via the Principle of Fair Play, that those enterprises are morally obligated to pay such taxes here and now.

Nevertheless, those obligations, if they exist, do not imply any claims about how the international tax regime ought to be structured. Just like the subway system, the international tax regime ought to produce just distributions of benefits and burdens. The Principle of Fair Play does not bear on what those distributions are.

### III. COMPENSATION

Some scholars of tax law argue that the Capture Principle is justified by a principle of compensation. For example, Michael Graetz writes:

The idea that the source country has a fair claim to the income produced within its borders is also grounded in the view that foreigners, whose activities reach some minimum threshold, should contribute to the costs of services provided by the host government. . . Taxing that income is one way for the source country to be compensated for its expenditures on the services it provides.<sup>39</sup>

The normative premise in this argument appears to be:

**Compensatory Principle:** If the people of state *A* bear costs in providing public services to people who are not residents of *A*, the people of *A* collectively are owed a marginally greater share of taxing rights, a share whose value is equal to those costs that they bear.

The Compensatory Principle fits quite poorly with the Capture Principle.<sup>40</sup> The Capture Principle requires that each state receive a package of taxing rights that is proportionate to the amount of income derived from

39. Graetz, "Taxing International Income," p. 298. See also T.S. Adams, "The Taxation of Business," *Proceedings of the National Tax Association* 11 (1917): 185-94, at p. 186.

40. Several tax scholars have pointed out that the Compensatory Principle fits poorly with source-based taxation. See Musgrave and Musgrave, "Inter-Nation Equity," pp. 70-71; Robert A. Green, "The Future of Source-Based Taxation of Multinational Enterprises," *Cornell Law Review* 79 (1993): 18-86, at pp. 29-30; Auerbach et al., "Destination-Based Cash Flow Taxation," p. 36. I am arguing for a somewhat broader point: the Compensatory Principle fits poorly with any of the taxes that might be thought to satisfy the Capture Principle, including source-based taxes, destination-based taxes, and various formulary schemes.

economic activities within its borders. But there is nothing close to a 1:1 relation between the income earned from business activities within a state and the marginal burdens that those activities place on that state's public sector. A passive investor might earn billions from bets on derivatives that are sourced to a country and impose slight burdens on that country's public sector; a manufacturer, meanwhile, might barely break even, yet send thousands of trucks rumbling along its highways. The Compensatory Principle implies miniscule taxing rights over the investor and hefty rights over the manufacturer. The Capture Principle provides for the opposite.

Other schemes of taxing rights do better, by the lights of the Compensatory Principle. To devise such a scheme, start with an international tax regime that does well in light of all of our other objectives, then carve out the right for each state to enact "user fees" based on the burdens that market participants impose rather than the profits that they reap.<sup>41</sup> There is little reason to suspect that the moral costs of such a regime, in terms of setbacks to just compensation, would exceed those inherent in the Capture Principle. So, even if the Compensatory Principle is true, the Capture Principle does not follow.

#### IV. CONTRIBUTION

The strongest argument for the Capture Principle appeals to a principle of contribution. According to this argument, states make economic opportunities possible. Moreover, the argument continues, when states make economic opportunities possible, they should receive a share of tax revenues derived from those opportunities, simply *because* they contribute to those opportunities.

This argument, which I'll call the "Contributory Argument," is pervasive.<sup>42</sup> Here I'll pull out just two examples, jointly selected to illustrate the

41. Auerbach et al., "Destination-Based Cash Flow Taxation," p. 36.

42. See, in addition to citations in this paragraph, Lokken, "Income from Intellectual Property," pp. 240-42; Jeffrey M. Colón, "Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy," *San Diego Law Review* 34 (1997): 1-91, at p. 11; Reuven Avi-Yonah, "International Taxation of Electronic Commerce," *Tax Law Review* 52 (1997): 507-56, at p. 521; Michael Graetz and Itai Grinberg, "Taxing International Portfolio Income," *Tax Law Review* 56 (2003): 537-86, at p. 569; Roin, "Inversions," p. 1844; Martin A. Sullivan, "A Simple Explanation of the Sophisticated Case for Digital Taxes," *Tax Notes Federal*, February 3, 2020, pp. 696-99, at p. 698; Cui, "The DST: A Conceptual Defense"; Devereux et al., "Residual Profit Allocation by Income"; Schön, "One Answer."

extent of the contributions that have been considered morally relevant. J. Clifton Fleming, Robert Peroni, and Stephen Shay appeal to what *governments* do to make income possible. They argue that the United States should “tax a nonresident for accessing and exploiting the U.S. market that is, to a great extent, the creature of U.S. government services and programs.”<sup>43</sup> Richard and Peggy Musgrave, meanwhile, appeal to what states *as a whole*—their governments and their people—do to create opportunities for earning income.<sup>44</sup> The Musgraves discuss an example of state *A*, which is rich in capital but poor in materials, and state *B*, which is poor in capital but rich in materials. Given this distribution of productive factors, residents of *A* are able to earn more income from investments in *B* than from investments in *A*.<sup>45</sup> For that reason, the Musgraves conclude, *B* “should obtain a rental or royalty share in *A*’s gain over and above the addition to its labor income; and the appropriate way for *B* to obtain this gain would be to charge a tax.”<sup>46</sup>

Statements of the Contributory Argument tend to be terse, and they do not specify what, exactly, gives rise to each state’s claims to tax income derived from the economic opportunities that it creates. To be inclusive, I will consider two different interpretations of the argument.

### *A. The Proprietary Interpretation*

On one interpretation, the Contributory Argument asserts that states are entitled to attach monetary conditions on the use of resources within their territories, because they have property rights in their territories. This interpretation is suggested in several passages written by a variety of tax scholars.<sup>47</sup> Here is Peggy Musgrave:

The right of a jurisdiction to tax all income arising within its geographic borders is recognized as a fundamental entitlement. This permits a

43. Shay et al., “What’s Source Got to Do With It?,” p. 91.

44. Musgrave and Musgrave, “Inter-Nation Equity,” pp. 72–73.

45. *Ibid.*

46. *Ibid.*, p. 73.

47. Graetz, “Taxing International Income,” p. 298; Shay et al., “What’s Source Got to Do With It?,” p. 91; Peggy Musgrave, “Sovereignty, Entitlement, and Cooperation in International Taxation,” *Brooklyn Journal of International Law* 26 (2014): 1335–56, at pp. 1341–42; Dean, “More Cooperation, Less Uniformity,” p. 144 ff; David Elkins, “The Myth of Corporate Tax Residence,” *Columbia Journal of Tax Law* 9 (2017): 5–43, at p. 19.

country to share in the gains of foreign-owned factors of production operating within its borders; gains which are generated in cooperation with its own factors, whether they be natural resources, an educated and/or low-cost work force, or the proximity of a market. The tax revenue so obtained may be thought of as a national return to the leasing of these complementary factors to non-resident investors or temporary workers. . . .<sup>48</sup>

States, this thought might go, acquire property rights in their territories in a Lockean fashion, by enforcing justice, providing public goods, and performing their other functions, thereby creating value in their territories.<sup>49</sup> Because they have such rights, they are entitled to attach monetary conditions on access. Just as I am entitled to charge a fee for access to my land, states are entitled to impose taxes for access to theirs.

This proprietary interpretation makes the Contributory Argument a weak one. First, the argument overshoots the mark. Yes, it implies that states are entitled to impose proportional taxes on economic activities within their territories. But it also implies that states are entitled to impose all sorts of other conditions as well, some of which violate the Capture Principle. When I announce a fee for accessing my land, I am not limited to charging you for whatever income you earn while on my land; I am entitled to request that you pay money that you earned elsewhere. By the same token, this argument implies that state *A* is entitled to tax market participants who visit *A* on income that they earn in state *B*. In doing so, state *A* might prevent *B* from taxing income derived from economic activities in *its* territory (for there might be nothing left).<sup>50</sup> That result violates the Capture Principle. At the same time, the proprietary interpretation also proves too little. Though it might justify an initial allocation of taxing rights, it provides no reason for states not to *voluntarily transfer* their rights to achieve morally important goals. The fact that we have some

48. P. Musgrave, "Sovereignty, Entitlement, and Cooperation in International Taxation," pp. 1341–42.

49. See Ryan Pevnick, *Immigration and the Constraints of Justice* (Cambridge: Cambridge University Press, 2011), pp. 11, 13, 125–26; Miller, "Territorial Rights: Concept and Justification," pp. 258–62; Nine, *Global Justice and Territory*.

50. Shaviro calls this "Monty Python taxation," after one of that series' jokes, in which a bowler-hatted man says, "To boost the British economy, I'd tax all foreigners living abroad." Shaviro, "Taxing Potential Community Members," p. 94.

property rights now is no reason for us, the property holders, to keep it that way. So the proprietary interpretation provides no reason to prefer any scheme of taxing rights rather than another—Capture Principle-respecting or otherwise—so long as transitions between schemes are procedurally adequate.

### *B. The Distributive Interpretation*

Alternatively, we can read the Contributory Argument as appealing to a distributive principle, namely the:

**Contributory Principle:** Each state's share of global economic resources ought to be proportionate to its members' contributions to the global surplus.<sup>51</sup>

On this interpretation, the Contributory Argument continues to note some important ways in which people contribute to the global surplus. By paying taxes, participating in politics, and complying with the law, we sustain our states' policies which, in turn, enable economic cooperation.<sup>52</sup> Moreover, the argument asserts, the contributions that we make, in these public capacities, often are realized in income earned by market participants hosted by our states. (Think about Apple, whose profits depend upon those ordinary Germans who protect its stores and enforce its intellectual property). If untaxed, income earned by visiting market participants often will fall into foreign pockets. Thus, it is possible that some states' shares of economic resources will not accurately reflect their contributions to the global surplus. By taxing income generated from economic activity within

51. For a somewhat less determinate version of this premise, see Mathias Risse and Gabriel Wollner, "Critical Notice of Aaron James, *Fairness in Practice*," *Canadian Journal of Philosophy* 43 (2013): 382-401, at pp. 394-95; Mathias Risse and Gabriel Wollner, "Three Images of Trade," *Moral Philosophy and Politics* 1 (2014): 201-25, at p. 206. Relatedly, Gillian Brock argues that governments are entitled to "fair returns on their investments. . . especially when the beneficiaries are non-citizens." Michael Blake and Gillian Brock, *Debating Brain Drain* (Oxford: Oxford University Press, 2015), p. 68.

52. For this gloss on "sustaining" the state, see Stütz, *Territorial Sovereignty*, p. 120. See also Andrea Sangiovanni, "Global Justice, Reciprocity, and the State," *Philosophy & Public Affairs* 35 (2007): 3-39.

their borders, however, states can capture some of those contributions that otherwise would be lost. Thus:

**Instrumental Premise:** International tax regimes that satisfy the Capture Principle cause the Contributory Principle to be more fully satisfied than international tax regimes that violate the Capture Principle.

If these premises are true, the Capture Principle follows.

I will argue that the Contributory Argument fails under this interpretation as well. For the sake of argument, I will assume that the Contributory Principle is true.<sup>53</sup> Instead, I will try to show that the Instrumental Premise is false. Since states have so intensely shaped each other through economic interaction, income that arises anywhere is—to a great extent—the product of contributions from elsewhere. Wall Street’s banks, Nagoya’s machines, and Chianti’s grapes would not exist if ordinary people halfway across the world did not sustain their own states, which, in turn, configure global economic cooperation. Thus, honoring the Capture Principle is a bad way of providing each state with a proportionate return on its contributions to the global economy. A wide range of alternative international tax regimes would do at least as well.

Let me situate my argument by comparing it to a familiar puzzle in the field of international tax law. The puzzle concerns two issues: first, where, exactly, the economic activity that generates a given item of income takes place; second, if activities in multiple jurisdictions generate a single item, how to apportion taxing rights over that item.<sup>54</sup> Suppose, for example, that a corporate lawyer is educated in the United Kingdom, trained in France, and subsequently employed in Germany.<sup>55</sup> Is her income generated only from economic activity in Germany, or is it also generated from activity in the United Kingdom and/or France? If taxing rights over her income should be split among these states, how exactly should they be split? Tax scholars have struggled to answer these questions, and some have

53. For the record, I believe that the Contributory Principle is false, but I will not pursue an argument against it here.

54. See, e.g., Reuven S. Avi-Yonah, “International Tax as International Law,” *Tax Law Review* 57 (2004): 483–502, at p. 490; Adam Rosenzweig, “Defining a Country’s ‘Fair Share’ of Taxes,” *Florida State University Law Review* 42 (2015): 373–426, at pp. 373–76.

55. Kane discusses an example like this. Kane, “Defense,” pp. 347–48.

concluded, in despair, that the questions lack good answers.<sup>56</sup> This puzzle, however, tends to be seen as a challenge *within* the Capture Principle, not as a challenge to the principle itself. In cases like that of the corporate lawyer, it's typically thought that the Capture Principle applies in a rather distended fashion but still rules out taxing rights for everywhere but Germany, the United Kingdom, and France.<sup>57</sup> I am pushing a more radical point. The corporate lawyer's income is not only the product of the United Kingdom, France, and Germany; it is just as much the creation of Spain, Egypt, Venezuela, and countless other states.

I'm going to make my argument in three steps. First, I will describe a model that clearly displays my main normative claims about cooperation and contribution, and I will assert what those claims imply about the real world. Then I'll consider challenges to my main normative claims. Finally, I'll consider objections to the analogy between the model and the real world.

### ***A Model and an Analogy***

Consider:

*Gains from Trade:* The world contains two states, Appalachia and Breadbasket. People in each state demand some grain and some coal. Production is divided between these two goods.

In the beginning ( $T_0$ ), Appalachia and Breadbasket do not trade with each other. In each closed economy, \$100 invested in coal mine or in a farm yields \$1 of income per year.

At  $T_1$ , Appalachia and Breadbasket begin to trade. Given the distribution of productive factors—Appalachia has open deposits of coal but little arable land; Breadbasket has bounteous soil but inaccessible coal—each state has a comparative advantage in producing one good rather

56. Edward Kleinbard, "The Lessons of Stateless Income," *Tax Law Review* 65 (2011): 99–172, at p. 135; Wolfgang Schön, "International Tax Coordination for a Second-Best World (Part I)," *World Tax Journal*, September 2009: pp. 67–114, at p. 68; Daniel Shaviro, "The Crossroads Versus the Seesaw," *Tax Law Review* 69 (2015): 1–42, at p. 29; Bradford, "The X-Tax in the World Economy," p. 21.

57. See Adolfo Martin Jimenez, "BEPS, the Digital(ized) Economy, and the Taxation of Services and Royalties," University of Cadiz Tax Working Papers 2018/1 at 5 n. 6 (2018); Daniel Shaviro, "Digital Services Taxes and the Broader Shift from Determining the Source of Income to Taxing Location-Specific Rents" (unpublished manuscript). See also Rosenzweig, "Fair Share," p. 396.

than the other. Thus, by enabling specialization, trade adds to the global surplus. In equilibrium, some of this surplus is allocated to producers, so that \$100 invested in a coal mine or a farm now yields (in real terms) \$10 of income per year.

Amy resides in Appalachia. Amy invests \$100 in an Appalachian coal mine that sells exclusively to Appalachian customers. The mine turns a profit in the current year, \$10 of which is Amy's share.

In this case, the Capture Principle and the Contributory Principle are sharply at odds. Amy's gain is a *paradigmatic* example of income generated from economic activity within a single state. Her mine sits in Appalachia, extracts coal from Appalachia, and sells to Appalachians. Thus, the Capture Principle cedes some taxing rights over her income to Appalachia and none to Breadbasket. The Contributory Principle, however, implies something quite different. Yes, by sustaining the Appalachian state, Appalachians provide a social framework that is necessary for Amy to turn a profit. But Amy's profits depend on Breadbasketians too. By sustaining *their* state, they enable Breadbasketian agriculture to flourish, and they let Appalachians share in its bounty through trade. If Breadbasket's grain did not free Appalachians to do what they do best, Amy's investment would be far less lucrative. It would yield only \$1/year, not \$10/year. So the vast majority of Amy's gain ( $\$10 - \$1 = \$9$ ) is the *joint* product of contributions from Appalachia and Breadbasket. Thus, the Contributory Principle implies that Appalachia and Breadbasket should share taxing rights over most of Amy's income. At most, Appalachia is exclusively entitled to tax only what I will call the "autarkic residual"—that is, the portion of Amy's gain (in this case, \$1) that she would have earned from investing in Appalachia under autarky.<sup>58</sup>

If my analysis of Gains from Trade is correct, the Contributory Argument does not imply the Capture Principle in the real world. Each state's economy reflects the accrued gains of economic interaction with outsiders over hundreds and, in some cases, thousands of years.<sup>59</sup> Thus, adhering to the Capture Principle is a highly inaccurate way of

58. Cf. Aaron James, *Fairness in Practice* (Oxford: Oxford University Press: 2012).

59. Risse and Wollner, "Three Images of Trade," p. 206.



providing people with a proportionate return on their contributions to the global economy. Many alternative international tax regimes would do at least as well.

### ***The Model Reconsidered***

This was my central claim about Gains from Trade: if Appalachians contribute to Amy's income, Breadbasketians do as well. Proponents of the Contributory Argument probably would object to that claim. According to this objection, even though Breadbasketians cause Amy's income, they do not contribute to it in a morally significant way.

One initial problem for this objection is that playing one's part in a cooperative scheme frequently appears to give one a claim to share in its benefits. Consider a variation on Locke's classic example, in which two people, Cynthia and Daniel, are gathering apples together.<sup>60</sup> Cynthia sits on Daniel's shoulders, so that she can grasp some apples which neither one can reach on their own. It seems hard to deny that, if Cynthia has a claim to the harvest, so does Daniel. And surely that is the very idea that gives the Capture Principle its initial appeal: market participants sit on *our* shoulders, when they reap profits in our territory. Since global markets are integrated, however, we're not the only ones at the bottom of the tree.

The proponent of the Contributory Argument might respond that I am being sloppy in my descriptions of cooperative schemes. "It's true," he might say, "that Appalachians cooperate with each other and Breadbasketians cooperate with each other. But Appalachians don't cooperate with Breadbasketians, and Breadbasketians don't cooperate with Appalachians. At least, not in the relevant sense."

But in what sense do Appalachians and Breadbasketians *not* cooperate with each other? Trade is a canonical instance of cooperation.<sup>61</sup> Moreover, Appalachians and Breadbasketians cooperate with each other, through trade, by means of their public activities. Appalachians cooperate by sustaining

60. John Locke, *Second Treatise of Government* § 28, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

61. See Joseph Heath, "The Benefits of Cooperation," *Philosophy & Public Affairs* 34 (2006): 313-51. Even though Heath criticizes a tendency within political philosophy to assimilate *all* the gains of cooperation to gains from trade, he does grant that gains from trade are the "best-known instance" of cooperative gains. *Ibid.*, p. 314.

policies that define Breadbasketian property, enforce Breadbasketian contracts, and so on—and Breadbasketians do likewise. So Breadbasketians play their part in a cooperative scheme that causes Amy's income.<sup>62</sup>

Perhaps, though, playing one's part in a cooperative scheme does not necessarily give one a claim to share in all the benefits of cooperation. In particular, the proponent of the Contributory Argument might say that we lack claims to share in those benefits that are merely the accidental by-products of cooperation.<sup>63</sup> Suppose that Cynthia, while gathering apples atop Daniel's shoulders, spots a pleasant glen that is the perfect site for her house. She moves and is substantially better off. Though Daniel's cooperation benefits Cynthia, it seems that he lacks any significant moral claim to share in Cynthia's domestic bliss. He could not demand a "finder's fee." Similarly, the proponent of the Contributory Argument might say that Breadbasketians cause Amy's income by accident and therefore do not contribute to it (in a morally significant way).

I am skeptical of this response. To make good on it, one needs to explain why certain benefits are accidental and others not, and one's account must imply that *Appalachians* non-accidentally contribute to Amy's profits while *Breadbasketians* contribute accidentally. Any such account faces a dilemma. If the conditions of non-accidental contribution are loose, Breadbasketians have a claim to share in Amy's profits. If the conditions of non-accidental contribution are tight, Breadbasketians lack a claim to share in Amy's profits—but Appalachians lack one too. Either

62. Some philosophers believe that *social* cooperation is normatively distinct from other forms of cooperation. See, e.g., John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), pp. 5–8; Samuel Freeman, "The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice," in *Justice and the Social Contract* (Oxford: Oxford University Press, 2007), pp. 259–96; Andrea Sangiovanni, "Global Justice, Reciprocity, and the State." Later, I will address whether that claim, if true, helps to save the Contributory Argument. For now the point is merely that Appalachia and Breadbasket cooperate with each other in a relatively thin sense, one that is analogous to the cooperation of Cynthia and Daniel.

63. Cf. David Miller, "Two Cheers for Meritocracy," *The Journal of Political Philosophy* 4 (1996): 277–301, at p. 287 ff. Cullity makes a similar point in a related context. Cullity claims that one is morally obligated to comply with a conventional scheme, in virtue of receiving benefits from it, only if one, on net, benefits from it. But Cullity also claims that not *every* cost and benefit caused by the scheme is relevant to determining whether one benefits on net from it: "if the Fare-Evader is eventually run over by a bus, this does not show that her fare-evasion was justifiable after all." Cullity, "Moral Free-Riding," p. 17.

way, the accidental/non-accidental distinction fails to license the distinction required to save the Contributory Argument.

To see this, consider a few attempts at describing the accidental/non-accidental distinction.<sup>64</sup> Perhaps, in order to benefit you non-accidentally, it must be foreseeable that you will receive a particular kind of benefit from my cooperation. But this is too loose; it is foreseeable that foreign trading partners will benefit from our sustaining our state. Alternatively, suppose that I must intend that you receive a particular kind of benefit from my cooperation. That is too tight. Few people pay their taxes, vote, or obey the law in order to create profits for Starbucks. Many more sustain their states to support a bustling economic environment, an end which instrumentally entails benefiting hosted market participants. But, in a world marked by global economic cooperation, the end of increasing prosperity within one's own economic environment also instrumentally entails benefiting market participants half a world away. So if benefits can be rendered non-accidental by such instrumental links, Breadbasketians have a claim to share in Amy's profits.

Let's now examine one final response from the proponent of the Contributory Argument. One obvious difference between Appalachia and Breadbasket is that Amy's mine operates in Appalachia, not Breadbasket. Statists have argued that relationships among compatriots are relevant to *egalitarian* justice. Perhaps their normative premises, if true, imply that state borders are relevant to *contributory* justice as well.

Statism, however, does not justify the required distinction. In order to justify that distinction, it is not enough to show that living under a state (any state) is normatively significant. Breadbasketians, after all, live under *their* state, and their interactions within that state contribute to Amy's income. Instead, one must show that there is something special about living under the state *where the market participant's income is earned*. And that claim does not follow from the most plausible accounts of statism.

Consider, first, Michael Blake's exemplary coercion-based account.<sup>65</sup> According to Blake, when we are subject to pervasive and direct coercion,

64. I follow Miller, "Two Cheers for Meritocracy," in explicating the accidental/non-accidental distinction by appeal to the mental states of participants.

65. Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs* 30 (2001): 257-96. For a related, but importantly distinct, account, see Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33 (2005): 113-47.

we are entitled to make a special justificatory demand about how that coercion is exercised, and this demand is satisfied only when resources are distributed in an egalitarian fashion among us subjects. How might one adapt this into a claim about contributory justice? Maybe we have claims, under the Contributory Principle, when some surplus value is caused by our subjection to (pervasive and direct) coercion. But that idea does not sever the Breadbasketians from Amy's gain. The Breadbasketians are forced to comply with the laws of *their* state, and their compliance, in turn, causes Amy's gains in Appalachia. Maybe, then, we have contributory claims when some surplus value is caused by our subjection to (pervasive and direct) coercion *and* that value arises in the territory of the authority that coerces us. But how does this territorial proviso follow from Blake's account? A Blakean could assert one of two things. First, she might say that we are entitled to some special justification for being coerced when (but only when) our coercion results in surplus within the jurisdiction of the coercive authority. Second, she might say that this justificatory demand is satisfied by the mere fact that the surplus arises extraterritorially. Neither of these claims, however, seems faithful to Blake's reasons for emphasizing coercion in the first place. When I am coerced, when my will is bent to your benefit, what is it to me that you happen to collect the benefit on the other side of a line we've drawn on a map?

Similar points hold within the main alternative to coercion-based statism, the reciprocity-based account articulated by Andrea Sangiovanni.<sup>66</sup> According to Sangiovanni, resources must be distributed in an egalitarian fashion among people who mutually uphold a set of institutions that provide one another with the basic means for living fulfilling lives.<sup>67</sup> If people are entitled to a proportionate return on any surplus value that they create by upholding some set of such institutions, the Breadbasketians are entitled to share in Amy's gain. To preserve the Contributory Argument, then, a Sangiovannian might limit our claims under the Contributory Principle to that surplus value which arises *within the territory of those institutions we uphold*. But, again, what justifies this territorial proviso? The basic Sangiovannian thought is that, when *your* prosperity depends on *my* effort, I am entitled to share in your good fortune.<sup>68</sup> What is it to me where you reap your gains?

66. Sangiovanni prefers the label "internationalism," rather than "statism." Sangiovanni, "Global Justice, Reciprocity, and the State"; Andrea Sangiovanni, "Solidarity in the European Union," *Oxford Journal of Legal Studies* 33 (2013): 213–41, at pp. 219–20.

67. Sangiovanni, "Global Justice, Reciprocity, and the State."

68. This is particularly clear in Sangiovanni, "Solidarity in the European Union," p. 220.

To be perfectly clear, the points I just raised do not presuppose that Blake or Sangiovanni incorrectly answered the question that they set out for themselves. Blake and Sangiovanni asked, “Among which groups of people does justice require resources to be distributed in a somewhat egalitarian fashion?” Though for different reasons, they both answered, “Only compatriots.” That might well be true, even if—as I claim—the resources to be distributed within each state are not only those derived from economic activities in that state.

### ***The Analogy Reconsidered***

An alternative line of response contests my analogy between Gains from Trade and the real world. To construct my model, I stipulated various facts which, one might think, are unrepresentative of the global economy. In particular, one might think that my model minimizes the significance of host states’ contributions, and it exaggerates the importance of external contributions.

To visualize this thought, contrast my model with a more realistic example. In Gains from Trade, I stipulated that Appalachia’s autarkic residual is relatively low (\$1/\$10), and I also suggested that Appalachia and Breadbasket contribute equally to the production of the remaining surplus. Now consider a Napa Valley vintner. Perhaps the vintner would earn somewhat less if Americans did not transact with the rest of the world. But the vintner certainly would earn far, far less if the United States didn’t maintain roads in California, didn’t enforce property rights, and, more generally, didn’t remain a civil society.<sup>69</sup> So, this thought goes, the United States’ contribution to the vintner’s gain is much greater than that of other states. Perhaps the United States’ autarkic residual is high; perhaps the United States contributes disproportionately to economic cooperation when commerce occurs within American territory; perhaps both. If this objection is sound, the gap between the Contributory Principle and the Capture Principle is smaller than I have let on. The Capture Principle might well be a good maxim for tax policy, a rule of thumb.<sup>70</sup>

This response underestimates the extent to which global commerce has shaped the world today and continues to sustain our present course.

69. Ryan Pevnick makes this point in a somewhat more general form. Pevnick, *Immigration and the Constraints of Justice*, p. 125. See also Samuel Freeman, *Rawls* (New York: Routledge, 2007), p. 422.

70. Cf. Dietsch, *Catching Capital*, p. 87.

When we imagine Napa Valley disconnected from the outside world, we need to imagine a profoundly different place, one that is so remote from the present that it is difficult to depict even sketchily. Here is how Kristi Olson describes it:

If the USA had never engaged in trade, the current population would be very different, the types of industry would be different, the Civil War as we know it would not have taken place, the political leadership would be different, technology would be different, and so forth. . . We have no idea what the population size, borders, level of technological development, or even the climate would be like if countries had never engaged in trade.<sup>71</sup>

Whatever this hypothetical California might be like, it's certainly a better place than the state of nature. But it's also vastly different from the present. Ordinary people in the rest of the world, by providing the social bases for global commerce, have helped to make the difference between that world and ours. Thus, in the real world, the fit between contribution and capture is poor.

The Contributory Argument might nonetheless be sound if other allocations of taxing rights are even worse. Definitively examining this possibility would require an extensive analysis of the comparative merits of different international tax regimes. We would need to calculate the contributions that each state has made to realize the present world rather than some normatively relevant baseline; we would then need to analyze the distributive effects of each international tax regime in question; and we would need to hold the latter up to the former.

For three reasons, I won't attempt such an analysis here. First, I am not sure which baseline to pick.<sup>72</sup> Should we imagine what each state would be like today, had it remained autarkic from its beginning? If so, when did each state begin, for our purposes? Should we say that Germany began in 1990, when it was reunified; in 1871, when the German Empire was formed; in 1815, when 39 small states established the German Confederation; in 800, when Charlemagne was crowned Holy

71. Kristi Olson, "Autarky as a Moral Baseline," *Canadian Journal of Philosophy* 44 (2014): 264–85, at p. 274.

72. For an insightful discussion of these issues, see *ibid.*

Roman Emperor? The political units of today have their own histories, most of which were heavily influenced by global economic integration. What are we to imagine about each state's internal politics?<sup>73</sup> Should they be wholly endogenous to the counterfactual circumstances? Or should they be constrained in certain ways: to be just, perhaps, or to lack secession movements? And what about each state's interactions with the rest of the world? Should we imagine that states can go to war, annex one another, enslave one another's people and extract one another's resources—as they did in the actual world? Or should we imagine that they are constrained to peaceful coexistence? Defenders of the Contributory Argument have not spoken to these questions, and it is not clear what to say on their behalf. Second, whatever the baseline might be, it is far removed from the actual world. Thus, the facts about surplus value in that world, and the extent to which different states have contributed to realizing the actual one rather than it, are shrouded in a deep fog of empirical uncertainty.<sup>74</sup> It's hard to see how one would even begin the analysis. Third, at the end of the day, even those who were initially attracted to the Contributory Argument might agree that such an analysis is not worthwhile. The Contributory Argument tries to express the intuition that, when a market participant's prosperity depends on the efforts of her hosts, they are entitled to share in her good fortune. As we've seen, its implications are very different. Those implications, I think, diminish whatever plausibility the argument's normative premise initially had. It's hard to see why anyone's fate in the actual world should depend on what would have happened in these counterfactuals.<sup>75</sup>

Nevertheless, if rewarding contribution remains our goal, it seems that many alternative international tax regimes would do at least as well, in expectation, as those that honor the Capture Principle. Consider two ambitious reforms:

73. Christian Barry, "The Regulation of Harm in International Trade," *Canadian Journal of Philosophy* 44 (2014): 255–63, at pp. 257–58.

74. Olson, "Autarky as a Moral Baseline"; Barry, "The Regulation of Harm in International Trade," p. 257.

75. Olson, "Autarky as a Moral Baseline," p. 277. Cf. Rawls, *Justice as Fairness*, pp. 54–55: "What counts is the workings of social institutions now, and a benchmark of the state of nature—the level of well-being (however specified) of individuals in that state—plays no role. It is a historical surd, unknowable, but even if it could be known, of no significance."

*Progressive Formulary Apportionment:* Under this reform, rights to tax corporations that operate in the European Union are split among Member States according to a fixed formula. The formula includes factors that measure how well-off people in different countries are. Less well-off states are allocated somewhat more generous taxing rights, all else equal. Thus, Italy (\$34,318 GDP per capita) has more generous taxing rights than Germany (\$48,195 GDP per capita), all else equal.<sup>76</sup>

*Bhagwati Tax:* Under this reform, Mexico has a fully exclusive right to tax non-resident citizens, living in the United States, on the income that they earn while in the United States. The United States is obligated to share information with Mexico about the income so earned.<sup>77</sup>

Each of these reforms violates the Capture Principle. But we have little reason to believe that either one would cause the Contributory Principle to be less fully satisfied. There is little reason to believe that Progressive Formulary Apportionment tracks all the contributions that Europeans have made to each other's economies, over the centuries, worse than a regime that confines taxing rights within each state's present borders. There is also little reason to believe that allocating to Mexico the exclusive right to tax expatriates living and working in the United States undermines how well the global tax system tracks the reciprocal contributions that those two states have made to each other over the years. Moreover, both of these reforms are quite ambitious departures from the Capture Principle. If neither does worse, in expectation, than the Capture Principle, a parallel point should hold for more incremental reforms as well.

76. This policy is a variation on the Common Consolidated Corporate Tax Base (CCCTB) that the European Union has flirted with over the past decade. For the most recent iteration, rolled out in 2016, see the European Commission's Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (2016). Ilan Benshalom advocates for progressive formulary apportionment in "How to Redistribute," pp. 355-57.

77. Jagdish Bhagwati initially unveiled a proposal for "taxing the brain drain" in "The United States in the Nixon Era: The End of Innocence," *Daedalus* 101 (1972): 25-47. The vignette I've described reflects his modified proposal in "International Migration of the Highly Skilled: Economics, Ethics, and Taxes," *Third World Quarterly* 1 (1979): 17-30.



## V. JUSTICE IN INTERNATIONAL TAXATION: A NEW RESEARCH AGENDA

According to the traditional way of thinking about justice in international taxation, there is a tight fit between allocating taxing rights in a territorial fashion and promoting some aspect of justice. I have argued that this apparent fit is illusory. Fair play does not determine how we ought to allocate taxing rights; and compensation and contribution issue far more abstract demands, demands that are equally well (if not better) satisfied by a wide range of alternative tax regimes. If I am right, then, we need to rethink how justice bears on international taxation.

In this section, I'll identify some of the main questions that need to be asked in that large project.<sup>78</sup> As an expository device, I'll talk about a concrete reform proposal, the Bhagwati Tax that I mentioned a moment ago. I've chosen to discuss a single example because we'll need some (stylized) empirical facts to appreciate the relevant questions, and those facts differ markedly across all the many circumstances touched by international tax law. I've chosen this particular example because it illustrates the issues in a relatively accessible way. At the end of this section, I'll restate the relevant questions, and I'll note how they are also at stake in more technical settings.

To start, let me add a few details to the reform I mentioned at the end of Section IV:

*Bhagwati Tax:* Beatriz was born in Mexico and is a Mexican citizen. Now she is a lawful permanent resident of the United States. She lives in Tucson, where she works as file clerk.

*STATUS QUO:* The United States has a fully exclusive right to tax Beatriz on her wages.<sup>79</sup>

78. For an analogous outline of a method for thinking about justice in greenhouse gas emissions, see Simon Caney, "Just Emissions," *Philosophy & Public Affairs* 40 (2012): 255–300, at pp. 291–99.

79. As I noted above, at n. 7, it is somewhat ambiguous whether the United States' right to tax Beatriz is fully exclusive, or whether Mexico also possess a right to tax Beatriz as one of its nonresident citizens. My points about the example should hold even if the latter possibility is true. Even if Mexico possesses a right to tax Beatriz under the status quo, the Bhagwati Tax that I have described would constitute a significant reform, for Mexico's right to tax Beatriz would become fully exclusive.

BHAGWATI TAX: Mexico has a fully exclusive right to tax Beatriz on her wages. To facilitate compliance, the United States has an obligation to share information about Beatriz's wages with Mexico.

The choice between the Status Quo and the Bhagwati Tax is, in the first instance, a choice about *fiscal capacity*—that is, the power to shape distributive outcomes through taxes and expenditures.<sup>80</sup> This choice affects the distribution of fiscal capacity in two distinct ways. The first is readily apparent. Under the Status Quo, the United States has the power to raise and redistribute revenue from Beatriz, and to shape her interactions with others by means of a labor income tax. Under the Bhagwati Tax, Mexico has a like opportunity. The choice between the taxing rights also impacts Mexico's fiscal capacity in a somewhat less obvious fashion.<sup>81</sup> The optimal tax imposed on Mexican residents depends on how willing they are to emigrate: the more willing they are, the lower the optimal tax. If Mexico has the right to tax expatriates, however, it has the power to increase the costs of migration. That, in turn, increases its power to tax its residents.

The first step in assessing the justice of a scheme of taxing rights is to specify how those rights result in a distribution of fiscal capacity. Most people would agree, however, that the most fundamental principles of distributive justice do not apply to distributions of fiscal capacity itself.<sup>82</sup> When a distribution of fiscal capacity is just or unjust, that is so because it

80. This is a somewhat broader definition of "fiscal capacity" than one finds in the economic literature. There it tends to refer to a government's capacity to raise *revenue*. See, e.g., Timothy Besley and Torsten Persson, "Taxation and Development," in *Handbook of Public Economics*, vol. 5, eds. Alan Auerbach et al. (Amsterdam: North Holland, 2013), pp. 51–110.

81. See John D. Wilson, "The Effect of Potential Immigration on the Optimal Linear Income Tax," *Journal of Public Economics* 14 (1980): 339–53; J.A. Mirrlees, "Migration and Optimal Income Taxes," *Journal of Public Economics* 18 (1982): 319–41; Jagdish N. Bhagwati and John Douglas Wilson, "Income Taxation in the Presence of International Personal Mobility: An Overview," in *Income Taxation and International Mobility*, eds. Jagdish Bhagwati and James D. Wilson (Cambridge: MIT Press, 1989), pp. 3–39, at pp. 4–5; Laurent Simula and Alain Trannoy, "Optimal Income Tax Under the Threat of Migration by Top-Income Earners," *Journal of Public Economics* 94 (2010): 163–73; Laurent Simula and Alain Trannoy, "Shall We Keep the Highly Skilled at Home? The Optimal Income Tax Perspective," *Social Choice and Welfare* 39 (2012): 751–82; Etienne Lehmann, Laurent Simula, and Alain Trannoy, "Tax Me If You Can! Optimal Nonlinear Income Tax Between Competing Governments," *Quarterly Journal of Economics* (2014): 1995–2030.

82. Dietsch and Rixen might disagree. See Peter Dietsch and Thomas Rixen, "In Defense of Fiscal Autonomy: A Reply to Risse and Meyer," *The Journal of Political Philosophy*

brings about a distribution of some *further* good. This further good is the “currency” of distributive justice.

Our next step, then, is to specify such a currency. For our purposes, one distinction about conceptions of the currency is particularly important. *Individualist* conceptions assert that the currency of distributive justice is some kind of *means for a good life*, such as primary goods, Dworkinian resources, or (opportunities for) well-being.<sup>83</sup> Fiscal capacity *causally* makes it the case that people have such goods; taxes and expenditures rearrange the bundles of wealth, career opportunities, and consumption goods that are available to each person. *Collectivist* conceptions assert that the currency of distributive justice is some kind of *means for shaping one’s own sociopolitical environment*.<sup>84</sup> Fiscal capacity *constitutively* makes it the case that people have such goods.<sup>85</sup> A unit of fiscal capacity *just is* a means for shaping one’s own sociopolitical environment.

Whatever we think the currency is, its distribution will depend on how states exercise their fiscal capacity. A tax on Beatriz, paired with an investment in American public schools, will produce a much different distribution of opportunities for well-being from the same tax paired with a transfer to coal companies. Similarly, the fiscal policies enacted by one state can impact foreigners’ opportunities for shaping their own sociopolitical environments. Suppose, for example, that under the Status Quo, migrants from Mexico into the United States are taxed lightly by the United States. Under this policy, migration from Mexico to the United States is less costly than it would be if the United States taxed immigrants heavily. Thus, on the margin, some Mexican residents have a more credible threat to emigrate if taxes imposed on them are too high. That, in turn, constrains the taxes that

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27 (2019): 499–511, at p. 503. Alternatively, they might be read to endorse a collectivist conception of the currency of distributive justice.

83. Some *loci classici* are Rawls, *A Theory of Justice*; Amartya Sen, “Equality of What?” *Tanner Lectures on Human Values*, ed. Sterling M. McMurrin (Cambridge: Cambridge University Press, 1980); Ronald Dworkin, “What Is Equality? Part 2: Equality of Resources,” *Philosophy & Public Affairs* 10 (1981): 283–345; G.A. Cohen, “On the Currency of Egalitarian Justice,” *Ethics* 99 (1989): 906–44.

84. A view like this is suggested in David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 3.

85. One state’s exercise of its fiscal capacity can also causally impact other states’ fiscal capacities, as I discuss below.

Mexico can impose on its residents. Thus, however we conceive of the currency, its distribution depends on how states will exercise the taxing rights they are given. The third step of our inquiry, an empirical one, is to forecast what states would do under each international tax regime.

At this point in the inquiry, if we had complete information, we would be able to say exactly how each scheme of taxing rights impacts the extent to which each person in the world enjoys the currency of distributive justice. We would be able to say, for example, that under the Status Quo, Beatriz has  $x_1$  opportunities for well-being, while Carlos has  $x_2$ , and . . . ; under the Bhagwati Tax, she has  $y_1$ , he  $y_2$ , and . . . Call these vectors *fundamental distributions*.

Now (fourth), we need to rank these fundamental distributions according to their justice. To do that, we need to identify and apply a set of principles of distributive justice. This step involves taking a stand on many of the debates that have played out in the recent philosophical literature: whether relative disadvantage matters in itself; whether an inherent concern for it is best understood in terms of equality or priority for the worse off; whether we ought to evaluate the global distribution as a whole or ought to partition it across states; how we ought to treat risk and uncertainty; and so on.

A fifth step of the inquiry is to determine the morally significant costs of promoting distributive justice through each allocation of taxing rights. Many costs of taxing rights are registered in the fundamental distributions, but it might be the case that not *all* of them are. For example, a common criticism of the Bhagwati Tax is that it transgresses upon freedom of movement.<sup>86</sup> Some might view the right of exit as imposing a deontic constraint on the pursuit of distributive justice by means of the Bhagwati Tax, one that provides some reason to oppose doing justice by this means.<sup>87</sup> Similarly, some theorists who favor an individualist currency of distributive justice might nonetheless view the Bhagwati Tax as illegitimate, since it sets back Americans' interests in collective self-determination and does

86. See Gary Clyde Hufbauer, "The State, the Individual, and the Taxation of Economic Migration," in *Income Taxation and International Mobility*, eds. Jagdish Bhagwati and James D. Wilson (Cambridge: MIT Press, 1989): pp. 83-94; Ariel Stevenson, "Recovering Lost Tax Revenue Through Taxation of Transnational Households," *Berkeley Journal of International Law* 34 (2016): 100-56, at pp. 106-07. For criticism, with which I largely agree, see Anna Stilz, "Is There an Unqualified Right to Leave?" in *Migration in Political Theory*, eds. Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016): 57-79.

87. Another position is that the Bhagwati Tax's constraint on exit simply impacts the extent to which particular individuals enjoy various means to a fulfilling life and is therefore already accounted for in the fundamental distribution (individualistically construed).

not promote Mexicans' like interests to a comparable extent. It's important to clarify the significance of concerns such as these and to determine how extensively they apply.

That concludes my outline. I've identified an agenda for thinking about justice in international taxation that is organized around five questions:

- (1) How does each scheme of taxing rights impact each state's fiscal capacity?
- (2) What is the currency of distributive justice?
- (3) How will each state exercise its fiscal capacity under each scheme of taxing rights?
- (4) How should we evaluate fundamental distributions?
- (5) What are the relative costs, in terms of other values, of promoting distributive justice through each scheme of taxing rights?

Working through the items on this agenda should illuminate practical controversies throughout international taxation, including efforts to address the headline-making tax-avoidance schemes that I mentioned at the beginning of this essay. For example, the European Commission recently proposed to allocate some taxing rights over a business's profits to those states in which it has a "significant digital presence" (SDP).<sup>88</sup> This reform principally targets major technology companies (such as Google, Facebook, and Amazon) who collect data from users in one jurisdiction and sell advertisements to clients in another. Under current law, countries where such users live frequently lack significant rights to tax these firms' profits; the SDP would change that.<sup>89</sup> If my arguments are sound, we shouldn't evaluate the SDP by asking whether users generate the firms' profits in some morally significant sense. We should instead ask: What would European states do with their rights under the SDP? What would be the *incidence* of the taxes imposed—that is, who would actually bear their brunt? Shareholders? All holders of capital? Labor? Would other potential holders of the taxing rights—such as those states where the tech firms' clients reside—improve the global distribution to a greater extent? Even if they would, might the European states have competing moral

88. See European Commission, Proposal for a Council Directive Laying down Rules relating to the Corporate Taxation of a Significant Digital Presence (2018).

89. For some discussion, see Wei Cui, "The Superiority of the Digital Services Tax Over Significant Digital Presence Proposals," *National Tax Journal* 72 (2019): 839–55.

claims based in collective self-determination? Do the states where the clients reside *also* have such claims? The empirical and the philosophical questions are daunting. But, if we want to achieve justice in taxation, we should own up to the challenge.

## VI. CONCLUSION

International tax reform is one of the great challenges of our time. In this article, I have examined several arguments for the Capture Principle, a principle that has guided discussions of international taxation from the field's inception to the present day. I have claimed that all of those arguments fail on their own terms. Even if we grant their normative premises, the Capture Principle does not follow.

My critical work suggests a broader conclusion: it is not necessarily unjust for states to lack proportionate opportunities to tax income derived from the economic activities that they host. I grant that my critical work does not logically entail that conclusion; even if certain arguments for the Capture Principle fail, others might still succeed. But it is difficult to envision what those other arguments might be like. Fair play, compensation, and contribution are the most significant aspects of the ideal of reciprocity that endows the Capture Principle with its initial appeal. Once we've subtracted them out, it's unclear what remains. Moreover, the elements that do remain might be vulnerable to objections that are similar to those that I've raised.

More positively, I have outlined a new method for thinking about justice in international taxation, according to which, broadly, we should evaluate international tax regimes based on how well they bring about relatively abstract distributive patterns. The method I've outlined provides far more questions than answers. I haven't aspired to describe what the desirable distributive patterns are, or which tax regimes bring them about. But sometimes it is substantial progress to gain the *right* questions, and I hope that the research agenda I've outlined here will bring us closer to glimpsing a more just world.