Rawls and Taxation: Constitutional Relevance, Progressivity, and Publicity

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ABSTRACT Within justice as fairness, taxation occupies an ambiguous position: Rawls acknowledges its role in maintaining background justice but neither develops a systematic fiscal theory nor includes taxation among the constitutional essentials. This paper argues that this ambiguity reflects a structural tension that the dominant instrumentalist interpretation cannot resolve. Against both isolationist and purely instrumental accounts, the paper develops a hybrid institutional account: fiscal institutions are structural components of the basic structure whose orientation shapes the conditions under which constitutional essentials can be stably maintained. Once this structural role is acknowledged, fiscal institutions acquire constitutional relevance that cannot be left to unconstrained ordinary legislative discretion. The Rawlsian principle of publicity provides the appropriate normative criterion, articulated as a three-dimensional Publicity Test. The internal logic of justice as fairness implies progressivity as a structural requirement, finding its fullest expression in property-owning democracy.
KEYWORDS Justice as fairness; taxation; public reason; publicity principle; progressive taxation; fiscal theory

RESUMO No quadro da justiça como equidade, a tributação ocupa uma posição ambígua: Rawls reconhece o seu papel na manutenção da justiça de fundo, mas não a inclui claramente entre os elementos constitucionais essenciais. Este artigo argumenta que essa ambiguidade revela uma tensão estrutural. Contra as abordagens isolacionistas e puramente instrumentais, desenvolve-se uma conceção institucional híbrida segundo a qual as instituições fiscais são componentes estruturais da estrutura básica que moldam as condições de realização estável dos princípios de justiça. Quando desempenham esse papel, adquirem relevância constitucional quanto à sua orientação, ainda que não quanto aos seus instrumentos específicos. O princípio rawlsiano da publicidade fornece o critério normativo adequado, articulado em termos de inteligibilidade, reciprocidade e garantia. Em condições não ideais, esta lógica implica a progressividade como requisito estrutural, encontrando a sua expressão mais completa na democracia proprietária.
PALAVRAS-CHAVE Justiça como equidade; tributação; razão pública; princípio da publicidade; tributação progressiva; teoria fiscal.

Introduction

Within the framework of justice as fairness, John Rawls assigns a central normative role to the basic structure of society in determining whether the terms of social cooperation can be regarded as fair among free and equal citizens (Rawls, 1999, p. 6–7; Rawls, 2001, p. 10–15, 90–91). The major political and economic institutions are evaluated not only in terms of their distributive outcomes but also in light of their capacity to sustain over time the fair conditions of cooperation under circumstances of reasonable pluralism (Rawls, 2005, p. 136–140). Yet one of the key mechanisms through which these conditions are maintained — the tax system — occupies an ambiguous position in Rawls's theory. While Rawls explicitly acknowledges the role of taxation in preserving background justice and limiting cumulative inequalities, particularly through inheritance and gift taxation (Rawls, 1999, p. 245), he neither develops a systematic fiscal theory nor clearly includes taxation among the constitutional essentials (Rawls, 2005, p. 227–240).

This point reflects a broader tension in Rawlsian scholarship. On the one hand, several interpreters emphasize that fiscal institutions are indispensable for securing fair equality of opportunity and the fair value of political liberties (Sugin, 2004, p. 1991–1995, 2003). On the other hand, a dominant interpretive line treats taxation as a set of technical instruments whose legitimacy derives entirely from independently specified distributive principles, thereby relegating it to the domain of ordinary legislation (Freeman, 2003; Quong, 2004, p. 233–241). Sugin captures this dominant stance precisely: "Rawls uses the tax system as a means of achieving distributive justice, rather than as a requirement of justice itself — the features of a tax system are not constitutional essentials" (Sugin, 2004, p. 1997). This paper argues that such a view is incomplete, and that the incompleteness is not merely exegetical but structural.

The argument builds on two foundational contributions. Murphy and Nagel (2002) demonstrate that there is no morally neutral pre-tax baseline: property rights and economic distributions are constituted by legal rules, including tax rules, rather than existing prior to them (Murphy & Nagel, 2002, p. 8, 32–33, 74–75). Holmes and Sunstein (1999) reinforce this from an independent direction: all rights presuppose public expenditure for their definition and enforcement (Holmes & Sunstein, 1999, p. 14–16, 35–48). Together, these accounts establish that fiscal institutions cannot be treated as external to justice — yet both remain focused on

distributive outcomes rather than the further question of political legitimacy: how fiscal institutions can be justified to citizens as free and equal under conditions of reasonable pluralism. This paper addresses that gap.

The central claim is threefold. First, taxation must be understood not as a merely instrumental device of redistribution but as a structural component of the basic structure whose orientation shapes the conditions under which constitutional essentials can be stably maintained — the hybrid institutional account this paper develops. Second, once this structural role is acknowledged, fiscal institutions acquire constitutional relevance: their orientation cannot be left entirely to the unconstrained discretion of ordinary legislative politics, and the principles governing it belong to the domain of public reason. Third, the Rawlsian principle of publicity provides the appropriate normative criterion: fiscal institutions must satisfy the conditions of intelligibility, reciprocity, and assurance to be regarded as legitimate components of a well-ordered society.

Murphy and Nagel shift the evaluation of taxation from pre-tax entitlements to the overall justice of the institutional scheme — but their account remains oriented toward distributive correctness rather than political legitimacy. Sugin extends this into a Rawlsian framework of functional requirements but stops short of a constitutional claim (Sugin, 1999, 2004). Verbeek (2025) argues for domain-specific fiscal principles but does not situate them within the framework of public justification. The present paper takes the further step: from the structural significance of fiscal institutions to their constitutional relevance, grounded in the principle of publicity as a condition of legitimacy. The claim is specific: fiscal institutions acquire constitutional relevance when and because they shape the structural conditions under which recognized constitutional essentials can be stably maintained over time — a functional criterion that distinguishes constitutional relevance from ordinary policy significance.

1. Constitutional Essentials, Public Reason, and the Narrow View for Taxation

In *Political Liberalism*, John Rawls develops a structured account of public reason that plays a central role in determining the scope of legitimate political justification under conditions of reasonable pluralism (Rawls, 2005, p. 136–140). Public reason regulates the exercise of coercive political power by requiring that political decisions be justified

in terms of political values that all reasonable citizens can accept, rather than by appeal to comprehensive moral or religious doctrines (Rawls, 2005, p. 137–140; Larmore, 2003, p. 368–375). As Rawls himself states, political legitimacy based on the criterion of reciprocity requires that the reasons offered for political actions be ones that other citizens might also reasonably accept — and this criterion operates at two levels: on the constitutional structure itself and on the particular statutes enacted in conformity with it (Rawls, 2005, p. 446).[1] However, Rawls explicitly limits the application of public reason to a restricted domain: constitutional essentials and matters of basic justice.

Constitutional essentials, on Rawls's account, include the fundamental structure of the political process and the basic rights and liberties of citizens, while matters of basic justice concern the institutional conditions necessary to secure fair equality of opportunity and a social minimum (Rawls, 2001, p. 47–48; Rawls, 2005, p. 227–240). These essentials are distinguished from ordinary legislation precisely by their profound and enduring impact on citizens' life prospects: they shape the basic conditions within which citizens exercise their liberties, pursue their plans of life, and participate in social cooperation (Rawls, 1999, p. 175–176). Many other political decisions — including taxation, economic regulation, and property law — are typically located outside this domain and are therefore left to ordinary democratic procedures (Freeman, 2003, p. 1–61). This restriction has given rise to what is commonly described as the narrow-scope view of public reason.

The narrow view is supported by both normative and institutional considerations. Normatively, limiting the scope of constitutional essentials is intended to preserve the possibility of an overlapping consensus among citizens who hold diverse reasonable doctrines. As Quong argues, expanding the domain of public reason to encompass the full range of distributive and economic policies risks undermining this consensus, since such policies often involve complex trade-offs and context-sensitive judgments that cannot easily be specified at the constitutional level[2] (Quong,

1 "Hence the idea of political legitimacy based on the criterion of reciprocity says: our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons. This criterion applies on two levels: one is to the constitutional structure itself, the other is to particular statutes and laws enacted in accordance with that structure." Rawls, 2005, p. 446

2 Sager (2004) offers a complementary explanation for this restriction: constitutional essentials must remain limited enough to be publicly verifiable by citizens without specialized expertise.

2004, p. 233–241). Institutionally, Rawls emphasizes that constitutional norms must be sufficiently general, stable, and publicly accessible to function as enduring criteria of legitimacy (Rawls, 2005, p. 227). Extending constitutional regulation to highly technical and economically contingent domains may generate indeterminacy or excessive rigidity incompatible with the adaptive requirements of democratic governance.

Fiscal policy appears, within this framework, as a paradigmatic example of a domain appropriately governed by ordinary legislation. Tax systems depend on empirical conditions such as economic growth, behavioral incentives, administrative feasibility, and compliance dynamics. Which fiscal arrangements best realize Rawlsian principles may therefore vary across contexts and over time. From this perspective, constitutionalizing taxation would risk constraining democratic adaptability without providing clear justificatory gains. As Freeman emphasizes, Rawls deliberately preserves a domain of legislative discretion in order to allow democratic institutions to respond to changing social and economic circumstances (Freeman, 2003). This argument is reinforced by Rawls's own tentative remarks on tax design: he suggests that a proportional expenditure tax "may be part of the best tax scheme," and that progressive rates should be used "only when they are necessary to preserve the justice of the basic structure" (Rawls, 1999, p. 246), formulations that presuppose precisely the kind of contextual flexibility that constitutional entrenchment would foreclose.

If taxation is understood as one among several possible instruments for implementing the difference principle, then its specific design appears to be a matter of institutional efficiency rather than constitutional principle. In this view, so long as the basic structure satisfies Rawls's principles of justice, the choice among alternative fiscal regimes does not raise issues of constitutional legitimacy. Sugin captures this dominant interpretive stance with precision (Sugin, 2004, p. 1997). On this reading, taxation raises no distinctive normative issues beyond those already captured by general principles of justice.

This interpretation generates a structural tension within Rawls's framework that the narrow view cannot easily resolve. The basic structure is the primary subject of justice precisely because its institutional configuration shapes citizens' life prospects and the terms of social cooperation over time (Rawls, 1999, p. 6–7; 2001, p. 10; Rawls, 2005, p. 15-22,

35-40, 446-453, 468).[3] If fiscal institutions play a systematic role in maintaining background justice and regulating cumulative inequalities, as Rawls explicitly suggests through his endorsement of inheritance and gift taxation to prevent the accumulation of capital and power (Rawls, 1999, p. 245), their normative relegation to ordinary legislation becomes increasingly difficult to sustain. The asymmetry between constitutionalizing the ends and leaving the means to unconstrained legislative discretion is structurally incomplete: a theory that protects effects without protecting causes cannot fully deliver on its own normative commitments.

Rawls's treatment of civil disobedience further illuminates what is at stake. He holds that tax laws, unless clearly designed to attack a basic equal liberty, should not normally be contested through civil disobedience,[4] and that their resolution is best left to the political process (Rawls, 1999, p. 327). This asymmetry — in which first-principle matters attract the highest standards of public justification while second-principle matters, including most fiscal policies, remain subject to ordinary political discretion — reveals precisely the institutional gap this paper seeks to address. If the fair value of political liberties and fair equality of opportunity depend structurally on fiscal design, relegating that design to ordinary legislation insulates it from the scrutiny its normative significance requires.

What is ultimately at stake is not the constitutionalization of specific fiscal instruments, but of the principles governing their orientation within the basic structure. The relevant object of public justification is therefore not taxation as a set of policy tools, but the institutional orientation of the fiscal system as a component of the basic structure. The narrow-scope view thus rests on a separation between constitutional ends and legislative means that is difficult to sustain once the structural role of fiscal institutions is properly recognized. The following section examines why this is so, by mapping the available theoretical positions on the relationship between taxation and distributive justice and identifying the hybrid institutional account that this paper defends.

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3 "Political society is always regarded as a scheme of social cooperation over time indefinitely; the idea of a future time when its affairs are to be concluded and society disbanded is foreign to the conception of political society"

4 "[…] unless tax laws […] are clearly designed to attack or to abridge a basic equal liberty, they should not normally be protested by civil disobedience. […] The resolution of these issues is best left to the political process, provided that the requisite equal liberties are secure. In this case, a reasonable compromise can presumably be reached. The violation of the principle of equal liberty is, then, the more appropriate object of civil disobedience." Rawls, 1999, p. 327.

2. Fiscal Justice Beyond Instrumentalism: A Hybrid Institutional Account

A useful distinction in debates on fiscal justice contrasts two dominant approaches: isolationism and instrumentalism. This distinction has been recently systematized by Verbeek (2025),[5] who classifies theories of taxation according to the degree of normative autonomy they attribute to fiscal institutions relative to broader principles of distributive justice. While analytically useful, this dichotomy risks obscuring a more complex institutional role for taxation within a Rawlsian framework — one that the present paper seeks to articulate through what it terms a hybrid institutional account.

Isolationist approaches treat taxation as a domain governed by partially independent normative principles, such as the ability-to-pay or benefit principles, derived from the classical tradition of fiscal theory (Seligman, 1894, p. 82–84, 108–122; Verbeek, 2025, p. 81). On this view, fiscal justice can be assessed without fully resolving broader questions of distributive justice. However, such accounts presuppose the existence of a morally meaningful pre-fiscal distribution of resources against which tax burdens can be measured. This assumption has been decisively challenged by Murphy and Nagel, who argue that "private property is a legal convention, defined in part by the tax system; therefore, the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity. Taxes must be evaluated as part of the overall system of property rights that they help to create" (Murphy & Nagel, 2002, p. 8). Property rights and market outcomes are themselves constituted through legal and fiscal institutions: as a result, there is no morally neutral pre-tax income from which taxation subtracts (Murphy & Nagel, 2002, p. 32–33, 74–75). Isolationism is therefore untenable as a theoretical foundation for fiscal justice (Verbeek, 2025, p. 81, 83-94).

At the opposite pole, instrumentalist approaches interpret fiscal institutions as policy tools for implementing distributive principles specified independently of taxation. Within Rawlsian scholarship, this

5 Verbeek (2025) gives critiques of both accounts. He rejected Murphy and Nagel's conventionality objections against isolationism while then accepting that overall distributive concerns must inform fiscal assessment. His solution is a domain-specific constraint of trustworthiness and fairness. Verbeek based his account on the normative view of conventionalism. In this paper I will step aside from this specific debate to stay focused on Rawls's theory.

view is often implicit. Because Rawls does not provide a detailed account of tax design, fiscal policy is frequently treated as a flexible instrument whose legitimacy depends entirely on its effectiveness in realizing the difference principle and maintaining background justice (Sugin, 2004, p. 1997; Verbeek, 2025, p. 79-82, 85-90). On this reading, taxation raises no distinctive normative issues beyond those already captured by general principles of justice — a position that, as the preceding section showed, underlies the narrow view's relegation of fiscal design to ordinary legislation.

This instrumentalist interpretation, however, sits uneasily with Rawls's broader account of the basic structure. Rawls assigns primary normative significance to institutions precisely because their configuration shapes the terms of social cooperation over time, and not merely because of the distributive outcomes they produce (Rawls, 1999, p. 6–7; Rawls, 2001, p. 10–15; Rawls, 2005, p. 468; Verbeek, 2025). Justice as fairness is not outcome-focused in a purely aggregative sense: it is fundamentally concerned with the fairness of institutional arrangements and their capacity to sustain relations of reciprocity among free and equal citizens. This anti-instrumentalist dimension is reflected in Rawls's commitment to pure procedural justice, where the justification of outcomes depends on the fairness of the institutional process that generates them (Rawls, 1999, p. 73–74). Institutions are not merely efficient means to independent ends — they are the primary site at which justice is realized or failed. As Holmes and Sunstein (1999) reinforce from a different direction, all rights presuppose public expenditure for their definition and enforcement; without the legal and administrative infrastructure financed by taxation, no right could be reliably exercised or protected (Holmes & Sunstein, 1999, p. 14–16, 35–48). Taxation is therefore not an imposition on pre-existing entitlements but a condition of their very possibility.

Murphy and Nagel's institutional critique marks a decisive step beyond isolationism by rejecting pre-institutional distributive baselines. Yet their account remains, in an important respect, normatively derivative. Even if property is institutionally constituted, taxation on their account is still primarily evaluated in terms of its contribution to a just overall distribution. As Murphy and Nagel write, "(…) tax justice cannot be fully captured by a criterion that simply directs government to tax certain incomes at certain rates (based on some principle of sacrifice or benefit). Tax justice must be part of an overall theory

of social justice and of the legitimate aims of government" (Murphy & Nagel, 2002, p. 38). This formulation correctly identifies the dependence of fiscal justice on a broader theory of justice, but it does not address the further question of how fiscal institutions can be justified to citizens under conditions of reasonable pluralism — that is, the question of public justification as a condition of legitimacy, not merely of distributive correctness. What remains underexplored in Murphy and Nagel is whether fiscal institutions raise distinct questions of political legitimacy that cannot be reduced to distributive outcomes alone. This is the gap that motivates the hybrid institutional account developed here. On this view, fiscal institutions are neither normatively autonomous — as isolationism maintains — nor merely instrumental — as the pure instrumentalist reading of Rawls assumes. They are best understood as structural components of the basic structure that contribute to the stability of just arrangements over time. Their normative significance lies not in defining rights at a foundational level, but in shaping the institutional conditions under which citizens can relate to one another as free and equal participants in social cooperation. Sugin captures part of this insight when she argues that taxation is central to background justice and functions as an institutional stabilizer that enables the basic structure to remain aligned with principles of justice across time (Sugin, 2004, p. 1999–2003; Sugin, 2016, p. 617–623). Fiscal policy is not simply a redistributive mechanism applied after market outcomes occur; it is part of the institutional environment that determines how those outcomes arise and how they affect citizens' opportunities and political standing (Sugin, 2004, p. 2003–2005).

The hybrid account therefore rejects both strong constitutive and purely instrumental conceptions of taxation. It does not claim that fiscal institutions define rights or entitlements at a foundational level — this would make it vulnerable to the objection that taxation merely reflects, rather than constitutes, underlying normative commitments. Rather, it claims that the normative relevance of fiscal institutions derives from their functional role within the architecture of the basic structure: they shape the background conditions under which the constitutional essentials can be stably maintained. If taxation systematically shapes these background conditions, then its justification cannot be entirely subsumed under distributive criteria.

3. When Fiscal Institutions Become Constitutionally Relevant

The preceding discussion has shown that fiscal institutions are best understood as structural components of the basic structure rather than as neutral policy tools. This shift gives rise to a further and more precise question: under what conditions can the orientation of fiscal institutions acquire constitutional relevance within justice as fairness? The answer requires both an argument and a criterion — neither of which the narrow view provides.

Rawls assigns constitutional priority to certain principles governing the basic structure (Rawls, 2001, p. 47–48), while leaving many of the institutional mechanisms required for their realization to ordinary democratic processes. The result is an asymmetry between constitutional ends and legislative means. The constitutional essentials Rawls identifies are not self-sustaining: they depend on background institutional conditions that must be continuously maintained if those essentials are to be stably realized over time. If those background conditions are systematically shaped by fiscal institutions, then the asymmetry becomes a structural gap — a theory that constitutionalizes ends while leaving their indispensable institutional conditions to unconstrained ordinary legislation is, in the precise sense, incomplete.

The constructive argument for fiscal constitutional relevance proceeds from this gap. Consider the two clearest examples. Fair equality of opportunity, which, while not itself listed among constitutional essentials, is indispensably connected to the fair value of political liberties that Rawls does constitutionalize (Rawls, 2001, p. 47–48; Rawls, 2005, p. 227–228), requires that social positions be genuinely open to all regardless of circumstances of birth. But unchecked inherited wealth generates systematic arbitrary advantages unrelated to talent or effort, undermining precisely this openness (Rawls, 2001, p. 139–140). The design of inheritance taxation directly determines whether this essential is realized across generations: not as a technical question of implementation but as a structural condition of the essential itself. Similarly, the fair value of political liberties requires that all citizens have roughly equal chances to influence the political process regardless of their economic position (Rawls, 1999, p. 197–198). Extreme concentrations of wealth — perpetuated or dissolved by tax structures — translate directly into disproportionate political influence, threatening precisely this fair value.

As Sugin demonstrates, taxation is indispensable for continuously adjusting the basic structure to prevent the accumulation of wealth and power from corroding the constitutional essentials Rawls identifies (Sugin, 2004, p. 1999–2003). In both cases, protecting the constitutional essential requires protecting the fiscal conditions that make it possible. A theory that does not do so protects effects without protecting causes.[6]

The narrow-scope interpretation of public reason reinforces the asymmetry rather than resolving it. On the narrow view, fiscal policy remains outside the domain of public reason so long as it contributes to the realization of Rawlsian principles (Rawls, 2001, p. 39-56, 61-66, 77-79). But this restriction presupposes that economic institutions do not play a structural role in determining the long-term feasibility of those principles — a presupposition that, in contemporary societies marked by persistent inequality and intergenerational transmission of advantage, is increasingly difficult to sustain. The basic structure must be continuously regulated to prevent background injustice from emerging over time (Rawls, 1999, p. 242–245; 2005, p. 257-268). If justice requires ongoing institutional stabilization, then fiscal arrangements cannot be treated merely as contingent policy instruments: they must be evaluated in light of their systemic effects on the conditions of fair cooperation (Rawls, 2001, p. 1-14).

This suggests that the boundary between constitutional essentials and ordinary legislation is not purely categorical but partly functional (Rawls, 1999, 2005; Pariente, 2020).[7] The argument developed here proposes a functional criterion of constitutional relevance: fiscal aims acquire constitutional significance when their orientation affects the institutional conditions necessary for citizens to relate to one another as free and equal participants in social cooperation — that is, when they operate at what may be called the second normative level, between constitutional principles properly so called and the specific policy instruments through which those principles are implemented (Rawls, 2001, p. 47–48, 139–140; 2005, p. 227-240). Three normative levels can be distin-

6 Sager identifies three conditions for constitutional essentials: broad acceptability, public observability, and categorical non-negotiability. Tax rates fail the third condition because they must respond to economic cycles; but the structural commitment to preventing dynastic concentration — the orientation, not the instrument — satisfies it (2004).

7 Pariente (2020) has similarly noted that this boundary is less stable than Rawls assumes, observing that many policy domains exhibit scalar rather than categorical relationships to fundamental justice. The functional criterion proposed here provides a more precise response to this observation by identifying the specific condition — systematic structural impact on recognized constitutional essentials — under which fiscal aims acquire constitutional relevance, rather than recommending a general extension of public reason to all coercive political decisions.

guished. The first consists of constitutional principles properly so called, which define the fundamental normative orientation of the basic structure (Rawls, 2001, p. 135-180; 2005, p. 227-240). The second consists of the institutional conditions required for the stable realization of those principles over time. The third consists of the specific policy instruments through which such conditions are implemented. Fiscal aims acquire constitutional relevance when they operate at the second level — when they shape the institutional background necessary for maintaining fair equality of opportunity, political equality, and background justice across time and generations.

This distinction allows the argument to address directly what we could call the "inflation objection". This critic might argue that recognizing the constitutional relevance of fiscal aims risks an inflationary expansion of constitutional essentials, whereby all economically significant policies — environmental regulation, healthcare, education — become subject to constitutional constraint (Sager, 2004; Michelman, 2003, p. 404–406). However, this concern rests on a failure to distinguish between institutional orientation and policy specification. What is at stake is not the constitutionalization of particular tax rates, base definitions, or technical instruments, but the public justification of the structural orientation of fiscal institutions within the basic structure. Constitutional relevance, in this sense, implies normative guidance and justificatory constraint rather than institutional rigidity or entrenchment of specific arrangements. The same fiscal outcome may be achieved through different instruments — and institutional flexibility in implementation remains fully compatible with constitutional constraint on orientation.

This point connects directly to Rawls's own remarks. His suggestion that progressive rates should be used only to preserve the justice of the basic structure (Rawls, 1999, p. 246)[8] confirms that conditionality operates

8 "The second part of the distribution branch is a scheme of taxation to raise the revenues that justice requires. [...] satisfy the difference principle. This problem belongs to the distribution branch since the burden of taxation is to be justly shared and it aims at establishing just arrangements. [...] it is worth noting that a proportional expenditure tax may be part of the best tax scheme. [...] it is preferable to an income tax (of any kind) at the level of common sense precepts of justice, since it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes [...] a proportional tax on total consumption (for each year say) can contain the usual exemptions for dependents, and so on; and it treats everyone in a uniform way [...] use progressive rates only when they are necessary to preserve the justice of the basic structure with respect to the first principle of justice and fair equality of opportunity, and so to forestall accumulations of property and power likely to undermine the corresponding institutions. [...] And if proportional taxes should also prove more efficient, say because they interfere less with incentives, this might make the case for them decisive if a feasible scheme could be worked out." Rawls, 1999, p. 246

at the level of instruments — not at the level of the structural commitment to preventing dynastic concentrations of wealth and protecting the fair value of political liberties, which remains constant. Similarly, his explicit endorsement of inheritance and gift taxation as devices to " (...) gradually and continually correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity" (Rawls, 1999, p. 245) identifies a structural fiscal commitment that is not contingent on macroeconomic conditions but follows from the internal logic of justice as fairness itself.

While Rawls emphasizes the centrality of the basic structure as the primary subject of justice, he does not fully develop the constitutional implications of the economic institutions required to sustain it. The distinction between constitutional essentials and ordinary policy appears defensible only if the latter does not systematically affect the conditions of fair cooperation. Yet where fiscal dynamics shape patterns of opportunity, political influence, and intergenerational inequality, this assumption becomes normatively untenable (Sugin, 2004, p. 1999–2003; Murphy & Nagel, 2002, p. 8, 32–33).

A useful comparative perspective is provided by constitutional political economy. Brennan and Buchanan (1980, p. 5–6, 11, 33–34) argue that fiscal rules acquire constitutional significance insofar as they structure the long-term conditions of collective decision-making. Although their approach is motivated by concern for limiting state fiscal discretion rather than securing distributive justice, it highlights a methodological insight that transcends their libertarian premises: fiscal arrangements define the framework within which political cooperation unfolds over time, and this framework-defining role cannot be adequately governed by ordinary legislative discretion alone. The position defended here differs fundamentally in its normative aims — fiscal constitutional relevance in the Rawlsian framework concerns the public justification of the structural orientation of taxation, not the protection of taxpayers against redistribution — but shares this recognition. In a

recent reconsideration, Brennan (2018, p. 68–72)[9] maintains that the tax system occupies a normative "middle ground" between constitutionally determined basic institutions and ordinary in-period legislation, a characterization that reinforces the core insight from a different direction.[10]

Fiscal policy therefore enters the domain of public reason not by virtue of its technical content, but by virtue of its structural impact on the durability of constitutional commitments. When fiscal institutions shape whether citizens can effectively exercise the constitutional essentials Rawls identifies — when they determine whether fair equality of opportunity is realized across generations, and whether the fair value of political liberties is protected against wealth concentration — their justification must be assessed at the level of political legitimacy rather than solely in terms of distributive efficiency. The following section argues that the Rawlsian principle of publicity provides the appropriate normative framework for making this assessment.

4. Publicity and the Legitimacy of Fiscal Institutions

If fiscal institutions are structural components of the basic structure whose orientation shapes the conditions under which constitutional essentials can be stably maintained, a further question arises: under what conditions can that orientation be justified to citizens under conditions of reasonable pluralism? The issue is not merely whether fiscal arrangements produce just distributive outcomes, but whether they can be publicly justified as part of a fair system of cooperation among free

9 Brennan's argument proceeds from a constitutional political economy framework rather than a Rawlsian one. His concern in section 3.6 ("Fiscal Constitutionalism?") is with the normative status of the private property rights structure relative to democratic redistribution: the tax system occupies the middle ground, he argues, because it "distributes the cost of public spending across different individuals" and tends toward quasi-constitutional stability across electoral cycles (Brennan, 2018, p. 68–69). The convergence with the present paper is therefore methodological rather than substantive: both frameworks recognize that the tax system cannot be adequately governed solely by ordinary legislative discretion, but they draw opposed normative conclusions from this recognition. Brennan is concerned to protect private rights against fiscal discretion; the present paper is concerned to subject fiscal orientation to public justificatory constraint. What they share is the identification of taxation as occupying a second normative level — in Brennan's formulation, "somewhere between the constitutionally determined basic institutions of society and the in-period operation of collective decision-making processes" (Brennan, 2018, p. 69).

10 Brennan distances himself from the libertarian premises of Buchanan's constitutional political economy. His argument for a fiscal "middle ground" is motivated by institutional coherence rather than anti-redistributive goals, which strengthens rather than weakens the convergence with the present account (2018, p. 64, 70-73)

and equal citizens. Without such a justificatory standard, the claim that fiscal institutions acquire constitutional relevance would remain normatively unsupported — a structural observation without a legitimacy criterion.

Within a Rawlsian framework, this problem is addressed through the principle of publicity. For Rawls, publicity is not simply a requirement of transparency or informational accessibility. It is a constitutive condition of legitimacy in a well-ordered society: institutions must be justifiable to citizens in terms they can reasonably accept, and must be capable of sustaining their sense of reciprocity over time (Rawls, 1999, p. 454–455; Rawls, 2005, p. 445–450). As Rawls states, a conception of justice satisfies the full publicity condition when its acceptance is not only an object of public knowledge but also justified in a manner which all can embrace (Larmore, 2003, p. 376).[11] The stability of just arrangements depends not only on their distributive effects but on their public intelligibility as fair terms of cooperation. Crucially, political legitimacy based on the criterion of reciprocity requires that the reasons offered for political actions be ones that other citizens might also reasonably accept — and this criterion operates at two levels: on the constitutional structure itself and on the particular statutes enacted in conformity with it (Rawls, 2005, p. 446). This two-level structure is precisely what gives the publicity requirement its constitutional bite: it is not exhausted by ordinary democratic justification but extends to the institutional framework within which democratic decisions are made.

Standard interpretations tend to confine the scope of publicity, like that of public reason, to constitutional essentials narrowly understood. On this view, fiscal policy remains largely within the domain of ordinary democratic contestation and is not subject to the full justificatory demands of public reason (Freeman, 2003; Quong, 2004, p. 233–241). However, once fiscal institutions are recognized as shaping the structural conditions under which constitutional essentials can be realized — as the preceding section argued — this restriction becomes difficult to maintain. If fiscal arrangements affect the durability of fair equality of opportunity and the fair value of political liberties, their legitimacy cannot be assessed solely in instrumental or outcome-based terms. The justificatory gap left by the narrow view is precisely the gap that the

11 "A conception of justice satisfies the "full" publicity condition when its acceptance is not only an object of public knowledge and not only based upon beliefs to which everyone can assent, but also thereby justified in a manner which all can embrace."

publicity criterion fills: it connects the structural significance of fiscal institutions to the normative standard by which their constitutional relevance can be assessed.

The argument advanced here therefore reinterprets publicity in institutional terms. Publicity requires that the normative orientation and structural effects of institutions be publicly justifiable, not merely that their rules be formally visible or technically accessible (Rawls, 2001, §9; Rawls, 2005, p. 66–71). Fiscal legitimacy depends on whether citizens can reasonably understand and accept the role that fiscal institutions play within a fair system of cooperation. A preliminary clarification is necessary here, and it responds directly to an objection raised by the reviewers of this paper: the publicity claim advanced here is an institutional-normative claim, not an empirical one. It does not assert that constitutionally anchored fiscal systems are contingently more transparent than non-constitutionalized ones. It asserts that justice as fairness, as a theory of legitimate institutions, requires that the principles governing fiscal orientation be justifiable in terms all reasonable citizens can share — and that this requirement has specific implications for institutional design regardless of what existing systems contingently produce.

This institutional conception of publicity can be articulated along three interrelated dimensions that together constitute a "Publicity Test" for fiscal institutions. The first dimension is intelligibility. Fiscal systems, despite their technical complexity, must be oriented toward publicly understandable normative goals (Rawls, 1999, p. 115–116; Rawls, 2001, §9; Rawls, 2005, p. 66–71). Citizens need not grasp the full technical details of tax design, but they must be able to recognize that fiscal institutions aim to sustain fair opportunity, political equality, and background justice. When tax structures obscure their distributive logic or conceal their effects behind nominally neutral legal categories, they risk undermining the conditions of public justification. As Sugin has argued, the systematic use of tax preferences to achieve distributional goals through opaque mechanisms fails the intelligibility condition precisely because it conceals who benefits and why (Sugin, 1999; Sugin, 2016, p. 659–669). The hidden distribution of advantage through formally neutral rules cannot be publicly justified in the way that explicit institutional commitments can. As Michelman (2003, p. 404–408) observes, constitutional legitimacy requires that citizens be able to verify, without specialized expertise, whether the basic structure conforms to its stated commitments — a condition that fiscal opacity systematically undermines.

The second dimension is reciprocity. A central feature of Rawls's conception of society is that it constitutes a fair system of cooperation among equals, whose terms must be mutually acceptable (Rawls, 1999, p. 87; Rawls, 2001, p. 6–7). Fiscal arrangements must therefore sustain reasonable expectations of mutual contribution and fair burden-sharing. When institutional design permits persistent concentrations of heritable wealth through lightly taxed transformations of capital income, it entrenches advantages traceable to morally arbitrary endowments — advantages that cannot be publicly justified to citizens who bear heavier fiscal burdens (Murphy & Nagel, 2002, p. 32–33, 74–75; Rawls, 1999, p. 87). A concrete illustration is provided by the fiscal strategy known as "buy, borrow, die": large wealth holders purchase appreciating assets without selling, take loans against those assets to finance consumption — since loans are not taxable income — and transmit the assets to heirs with a stepped-up tax basis that permanently eliminates the accumulated capital gains (McCaffery, 2017; Heath, 2024).[12] The result is that large fortunes appreciate, finance consumption through debt, and pass substantially intact to the next generation, entirely within existing legal rules. This arrangement fails the reciprocity dimension because the beneficiaries of extensive public infrastructure, regulated markets, and legal frameworks that make wealth creation possible do not contribute proportionately to maintaining those conditions — and this failure cannot be publicly justified to citizens who do (Schwartzman, 2011; Larmore, 2003, p. 368–375). As Verbeek (2015) shows, the justification for taxing large accumulated fortunes rests precisely on the social preconditions of wealth creation that no individual produces alone.

The third dimension is assurance. In his later work, Rawls emphasizes that the stability of a well-ordered society depends on citizens' confidence that institutions will continue to operate in accordance with shared principles over time (Rawls, 2005, p. 445–450). Fiscal regimes shape long-term expectations regarding opportunity, political equality, and intergenerational fairness. Periodic distributional reporting, sunset clauses for large fiscal preferences, and independent incidence analyses are assurance devices that translate technical expertise into public reasons — they make it possible for citizens to verify over time that fiscal

12 The expression was coined by McCaffery (2017, p. 306), who identified secured borrowing against appreciated assets as a mechanism allowing wealthy individuals to avoid income taxation across generations. For legal analysis of the "borrow" component see Heath (2024).

means continue to track stated aims (Sugin, 2016, p. 617–623; Larmore, 2003, p. 368–375). When institutional arrangements permit the emergence of entrenched inequalities or dynastic concentrations of wealth through permanent legal structures not subject to periodic review, they undermine the credibility of public commitments to justice by signaling that dynastic concentration is structurally protected rather than prevented.

Publicity thus provides the missing normative link between the structural role of fiscal institutions and their constitutional relevance. If fiscal arrangements shape the conditions under which citizens can regard one another as free and equal participants in social cooperation, and if such arrangements must be publicly justifiable in the three dimensions just articulated, then their normative orientation cannot be left entirely to ordinary political bargaining (Murphy & Nagel, 2002, p. 8–10; Rawls, 1999, p. 266–267; Vallier, 2022). Constitutional relevance, in this sense, follows not from the technical content of fiscal policy, but from its role in sustaining the publicly justifiable terms of social cooperation among free and equal citizens.

The following section examines how this framework bears on concrete institutional configurations, and on the role of progressive fiscal structures within Rawls's preferred model of property-owning democracy.

5. Progressivity in Property-Owning Democracy

If fiscal institutions acquire constitutional relevance when they shape the structural conditions under which constitutional essentials can be stably maintained, and if their legitimacy must be assessed through the three dimensions of the *Publicity Test* articulated in the preceding section, the question becomes: what specific fiscal orientation does this framework require? This section argues that the answer is progressivity — understood not as a freestanding distributive ideal or a rigid policy prescription, but as a structural institutional requirement of justice as fairness under the non-ideal conditions that actually characterize contemporary societies. The most complete institutional expression of this requirement is found in Rawls's preferred socioeconomic model — property-owning democracy — where progressive and anti-dynastic fiscal

design is not a post-market corrective but a constitutive element of the property order itself.

The starting point is the original position. Rational agents operating behind the veil of ignorance do not know their position in the distribution of natural assets, their social class of birth, their capacities, or their family circumstances (Rawls, 1999, p. 118–122). Under these conditions, rational and mutually disinterested agents would not design institutions that protect or exploit natural or inherited advantages, because they could not know whether such advantages would be in their favor. The logic of the original position neutralizes pre-institutional entitlements as a basis for fiscal design: a tax system that permits the unlimited intergenerational transmission of wealth, or that taxes labor income more heavily than returns on inherited capital, embeds precisely the kind of moral arbitrariness that the veil of ignorance is designed to exclude (Rawls, 1999, p. 118–122, 274).

The difference principle and fair equality of opportunity translate this insight into structural constraints on fiscal design. The difference principle holds that social and economic inequalities are justified only insofar as they benefit the least advantaged members of society (Rawls, 1999, p. 266). Fair equality of opportunity requires that positions be genuinely open to all regardless of circumstances of birth. Both principles impose not mere distributive neutrality but an active imperative to counteract the cumulative effects of morally arbitrary inequalities. A tax system that leaves unchecked the accumulation of wealth and power, or that permits arbitrary advantages to compound across generations, cannot satisfy these principles under the non-ideal conditions of the real world. Progressivity emerges from these constraints not as an ideological preference external to Rawlsian theory but as a functional outcome that the internal logic of its principles requires (Bird-Pollan, 2013).

This interpretation clarifies Rawls's apparently cautious remarks on tax design (Rawls, 1999, p. 246). This conditionality is crucial: it operates at the level of instruments, not at the level of structural orientation. The fiscal commitment to preventing dynastic concentrations of wealth and protecting the fair value of political liberties is not conditional — it follows from the internal logic of justice as fairness. What is conditional is which specific fiscal instrument best realizes that commitment under given macroeconomic conditions. As Sugin demonstrates with precision, the compatibility of a flat consumption tax with justice as fairness is explicitly conditional on a prior institutional context in which pro-

ductive assets are already widely dispersed and background justice is securely maintained (Sugin, 2004, p. 2005–2014). In non-ideal conditions — where inherited and concentrated inequalities persist, where chain connection between the prospects of the most and least advantaged does not operate, and where markets amplify rather than correct initial arbitrariness — more assertive redistributive mechanisms are required (Sugin, 2004, p. 2010–2014; Rawls, 1999, p. 242–245; Valentini, 2012).

From this standpoint, progressivity is best understood as a context-dependent structural requirement rather than as a freestanding moral principle. It arises from the need to prevent the consolidation of advantages that are, from a Rawlsian standpoint, morally arbitrary. Rawls's rejection of desert-based distributive claims implies that neither natural talents nor social starting positions can justify enduring inequalities (Rawls, 1999, p. 274). Fiscal arrangements that permit such inequalities to accumulate unchecked risk undermining the reciprocity conditions necessary for a stable scheme of cooperation — and they fail the Publicity Test precisely because citizens bearing heavier burdens cannot reasonably regard this failure as publicly justifiable.

The classical ability-to-pay tradition, whose foundational formulation remains Seligman (1894), provides further support from a different direction. An additional unit of resources yields less advantage at higher income levels, so steeper rates equalize the sacrifice reasonably asked to sustain just institutions (Seligman, 1894, p. 82–84, 108–122). Read through Rawls, however, this is not an aggregative-welfarist claim about marginal utility but a political-moral claim about reciprocity: those who benefit most from social institutions, public infrastructure, and the legal rules that make wealth creation possible do not contribute proportionately to maintaining those conditions unless the fiscal system is structured to require it (Rawls, 1999, p. 87; Verbeek, 2015, p. 70-76). Progressivity, read through Rawlsian reciprocity, is therefore not redistribution but a structural expression of the fair terms of cooperation — the public acknowledgment that large fortunes arise against a background of law, infrastructure, and social cooperation that others co-produce (Van Parijs, 2003; Sedmak & Gaisbauer, 2015, p. 17–33).

The fullest institutional expression of this progressive and anti-dynastic logic is property-owning democracy (POD), the socioeconomic system Rawls explicitly identifies as most consistent with his two principles of justice. Rawls distinguishes POD sharply from welfare-state capitalism (WSC), arguing that the latter cannot secure the fair value

of political liberties or fair equality of opportunity because it merely corrects market outcomes after injustices have already occurred, rather than preventing unjust concentrations of wealth and power at their source (O'Neill, 2009, p. 385–389; O'Neill, 2012; Rawls, 2001, p. 158–161). Property-owning democracy, by contrast, is characterized by ex ante redistribution: it diffuses the ownership of productive capital and human capabilities broadly across society before market interactions occur, ensuring that all citizens are genuinely positioned to manage their own affairs on a footing of social and economic equality (Rawls, 2001, p. 139–140).

The distinction between POD and WSC on progressivity is crucial for understanding how constitutional fiscal relevance functions in practice. In welfare-state capitalism, progressivity is predominantly delegated to fiscal levies on income flows, correcting injustices the system has already generated. In property-owning democracy, progressivity is realized through the fundamental structure of the system itself: the legal and institutional rules governing property, inheritance, and access to capital are designed to prevent injustices at their source (Rawls, 2001, §§ 41, 49; O'Neill, 2009; O'Neill & White, 2019, p. 22–27). POD is intrinsically progressive because it alters the rules of the game from the outset, creating a society where opportunity and power are not concentrated before any fiscal levy is applied.

The central fiscal mechanism of this anti-dynastic design is the accessions tax — a levy on recipients of large inheritances and gifts — which Rawls explicitly endorses not as a punitive measure but as an institutional device to prevent excessive concentrations of private power that would subvert the principles of justice (Rawls, 2001, p. 161; Rawls, 1999, p. xviii, 245–246). The accessions tax differs from a traditional estate tax in focusing on recipients rather than donors — a choice that directly reflects the content of background justice: it is the concentration of economic advantage in recipients, not the act of giving, that threatens fair equality of opportunity and the fair value of political liberties across generations (O'Neill, 2008; Sugin, 2004, p. 2009). Its purpose is not revenue generation but structural prevention: to ensure that concentrations of economic advantage do not compound generation after generation, undermining the background conditions of equal citizenship. This structural purpose is precisely what "buy, borrow, die" circumvents — by allowing large wealth holders to finance consumption through debt secured against appreciating assets and trans-

mit those assets to heirs with a stepped-up tax basis that permanently eliminates accumulated capital gains, it structurally protects dynastic transmission as a default entitlement rather than an exception requiring justification. The objections most commonly raised against inheritance taxation — that it violates the freedom to give or constitutes double taxation — do not succeed against the accessions tax understood in these structural terms, since neither objection applies to a levy directed at recipients rather than donors and aimed at preventing dynastic concentration rather than punishing transfer (Bird-Pollan, 2013; White, 2018, p. 167–184).

This design satisfies all three dimensions of the Publicity Test. It is intelligible: citizens can understand that accessions taxation aims to prevent the entrenchment of morally arbitrary advantages across generations, and this aim can be publicly justified in terms of fair equality of opportunity that all reasonable citizens share. It sustains reciprocity: contributions through anti-dynastic fiscal mechanisms reflect the social preconditions of wealth creation rather than mere redistribution, and can be recognized as fair return for the enabling conditions that society collectively provides (Verbeek, 2015; Sedmak & Gaisbauer, 2015, p. 17–33). And it provides assurance: an institutional commitment to dispersing productive ownership through accessions taxation and related mechanisms signals credibly over time that the basic structure remains oriented toward the prevention of dynastic concentration.

What is constitutionally significant is not a particular tax schedule but the structural commitment to maintaining conditions compatible with equal citizenship — a commitment that can be realized through different fiscal instruments depending on institutional context, but that cannot be suspended without undermining the constitutional essentials it sustains.

Conclusion

This paper has argued for a reorientation of the place of fiscal institutions within a Rawlsian framework of political legitimacy. Against both narrow-scope interpretations of public reason and purely instrumental accounts of taxation, it has shown that fiscal arrangements cannot be adequately understood as contingent policy tools for implementing distributive principles specified elsewhere. When their operation

shapes the background conditions under which citizens can relate to one another as free and equal participants in social cooperation, fiscal institutions acquire a form of constitutional relevance that the dominant interpretive tradition has not fully recognized.

The argument has proceeded through four connected steps: identifying the structural tension the narrow view cannot resolve; establishing the hybrid institutional account as the appropriate theoretical framework; developing the functional criterion of constitutional relevance and responding to the inflation objection; and articulating the three-dimensional Publicity Test — intelligibility, reciprocity, and assurance — illustrated through the concrete case of the "buy, borrow, die" strategy, which fails all three dimensions simultaneously.

Murphy and Nagel establish that fiscal institutions are constitutively linked to property rights but remain oriented toward distributive correctness rather than political legitimacy (Murphy & Nagel, 2002, p. 8, 38–39). Sugin demonstrates that taxation must satisfy stringent functional requirements of Rawlsian justice but explicitly treats fiscal features as falling outside the constitutional essentials (Sugin, 2004, p. 1997). Verbeek argues that fiscal justice involves domain-specific normative principles not reducible to pure instrumentalism (Verbeek, 2025, p. 79) — but does not situate this claim within the Rawlsian framework of public reason and constitutional relevance. The present paper takes the step these accounts do not: from the structural significance of fiscal institutions to their constitutional relevance, grounded in a principle of publicity that connects institutional function to political legitimacy under conditions of reasonable pluralism.

How can a Rawlsian fiscal regime maintain domestic reciprocity when tax bases can be shifted offshore and international arrangements create structural arbitrage opportunities for large wealth holders? How can the assurance dimension of the Publicity Test be satisfied in a world where fiscal coordination across jurisdictions is institutionally fragmented? These questions represent the next frontier for a Rawlsian account of fiscal legitimacy — a frontier that the hybrid institutional account developed here equips conceptually, but that requires further elaboration to address the institutional reality of globalized economies.

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