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## Introduction

**T**HIS IS A book about taxation. More specifically, it is about the controversies that shape Britain's approach to taxing the profits of companies. It aims to analyse these tax policy controversies in such a way as to illustrate their significance, not only for tax lawyers but also for public lawyers more generally, for political scientists and for political economists. Yet it offers nothing as simple as solutions to problems. Instead, it suggests important factors that those who offer such solutions cannot afford to ignore. The ideas at work in its pages, especially perhaps the relationship between government and the British operations of multinational corporations, have an almost universal importance.

But how are we to make sense of this legendarily contentious, arcane and complicated subject matter? I maintain that we have to engage with the historical and contemporary philosophical textures, not only of the corporate tax legislation itself, but also of the processes that bring it into being and of the institutions and other bodies whose processes they are. The effects of the tax planning activities of multinationals are now a major source of public concern, but the issues behind them are to most people highly obscure. So my approach is an interpretative one, firmly rooted not only in our contemporary notions about the design of tax systems, but also in historical ideas of the way that states should be governed. I argue that these insights, second nature as they are to politicians – to those who govern – are very revealing. This is so notwithstanding that the origins of the insights in question are often obscured by ideological dogma and technical detail. That said, the European Enlightenment's most important yet ambiguous philosopher of political economy, Adam Smith, has been invoked by Nigel (now Lord) Lawson, by Gordon Brown and by George Osborne, each to subtly different ends. The last mentioned, in his 2011 Budget speech, even went so far as to restate Smith's 'principles [on the design of taxes] . . . for the modern age'. In doing so, Mr Osborne resolved them, as has become customary, into the values of efficiency and of fairness:

Our taxes should be efficient and support growth. They should be certain and predictable. They should be simple to understand and easy to comply with, and our tax system should be fair, reward work, support aspiration and ask the most from those who can most afford the most.<sup>1</sup>

<sup>1</sup> Hansard HC vol 525 col 954 (23 March 2011).

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Drawing attention to Smith's continuing life on the lips of contemporary politicians is not to mistake rhetoric for reality. He appears, too, in *Tax by Design*, the final statement of the Mirrlees review of 2010 and 2011, set up by the respected economic policy think tank, the Institute for Fiscal Studies (IFS), to evaluate the British tax system. The IFS described Smith's famous maxims of taxation – equality, certainty, convenience and cost-effectiveness<sup>2</sup> – as commanding 'near universal support'.<sup>3</sup> They may not be sufficient in themselves for our globalised economy, but they are nonetheless necessary. Mirrlees' observations come as no surprise, since the tradition to which Smith belongs, and of which the other thinkers in these pages are a part, has been devoted to realising effective public policy amid the shifting values of commercial society. Specific references to the intellectual heritage of tax politics are admittedly rather rare. Most often, public policy discussion of taxation is dominated by fairly unreflective assertion. Much of what follows therefore will be devoted to illuminating the assumptions of tax policy. In this way, I hope, among other things, that the book will contribute to a broadening out of the discussion of the various components of the Mirrlees review.

One of the Mirrlees editors, Tim Besley, has himself paid tribute to Adam Smith's continuing relevance, as well as to that of one of the United States' founding fathers, James Madison (1751–1836). Besley takes the latter as the inspiration for his own political economy, which is directed at designing institutions and processes such that politicians do indeed pursue the 'common good of the society'<sup>4</sup> rather than their own personal advantage.<sup>5</sup> To Smith, too, is owed the particular idea of a theory, as used in this book, as a point of view, as a way of looking at a subject.<sup>6</sup> This might be the viewpoint of a politician intent on achieving a certain end, or it might be that of an impartial critic, trying to make sense of the workings of the reform process. So, when I talk about a theory of corporate taxation, I am referring both to the government's own plan for the transformation of the tax, in line with George Osborne's approach, and to a particular critical standpoint on corporate tax reform. Throughout, I have attempted to take a long-term view of the material, not just by recalling the Enlightenment origins of our contemporary concerns but by using examples from two decades of corporate tax policy, 13 years of which Gordon Brown dominated, first as Labour Chancellor of the Exchequer and subsequently as Prime Minister. The period after 2010 is certainly characterised by the making of inroads on Mr Brown's own personal idea of the appropriate organisation of

<sup>2</sup> A Smith, *The Wealth of Nations Books IV-V* [1776], AS Skinner (ed) (London, Penguin, 1999) 418.

<sup>3</sup> J Mirrlees, S Adam, T Besley et al, *Tax by Design* (Oxford, Oxford University Press, 2011) ch 2 (pre-publication draft chapters available at <http://www.ifs.org.uk/mirrleesReview/design> (accessed 30 November 2010)) 2.

<sup>4</sup> J Madison, 'The Federalist, 57' in A Hamilton, J Madison and J Jay, *The Federalist Papers* [1788], L Goldman (ed) (Oxford, Oxford University Press, 2008) 282.

<sup>5</sup> T Besley, *Principled Agents? The Political Economy of Good Government* (Oxford, Oxford University Press, 2006) 1.

<sup>6</sup> A Smith, *The Theory of Moral Sentiments* [1759/1790], RP Hanley (ed) (London, Penguin, 2009) 133; and M Loughlin, *Foundations of Public Law* (Oxford, Oxford University Press, 2010) 93.

Great Britain's national life. Corporations, and the reasons for taxing them, were fundamental elements of this idea.

Some of the assessments of Gordon Brown in these pages may seem generous. Contentious as Labour tax policy certainly was, however, it started by being extremely well informed.<sup>7</sup> Indeed, many of its achievements are likely to be retained, if the political reality of the 2011 Budget<sup>8</sup> – as opposed to its aspirations – was anything to go by. Both Labour and Coalition corporate tax policies have been versions of a vision of the role of taxation in neoliberal ideology, ones that have gained ground since the 1980s and have figured prominently in the foundational text of neoliberalism, the ten principles of the 1980s 'Washington Consensus'.<sup>9</sup> In this discourse, taxes are low and there are few, if any, special treatments for different classes of taxpayer. Its goal is to tax as many things as possible but – and this is the crucial thing – as lightly as possible.<sup>10</sup> Simplicity, stability, 'flatter' tax rates and the exact enforcement of tax liabilities are its watchwords.<sup>11</sup>

Indeed, it was the strand of economic liberalism of which these tax ideals are a part that made the 2010 Coalition between Liberals and Conservatives possible.<sup>12</sup> Its catalyst was a certain reading of Smith promoted by the Austrian philosopher and economist Friedrich von Hayek (1899–1992).<sup>13</sup> There is a story that the Conservative Prime Minister, Margaret (subsequently Baroness) Thatcher, sometime after taking office, slammed a copy of Hayek's *Constitution of Liberty* onto the Cabinet room table, shouting: 'This is what we believe'.<sup>14</sup> And it is undoubtedly the case that, consciously or unconsciously, modern calls for simplicity in taxation owe something to the longevity of the ideals of market liberalism. Certainly, Nigel Lawson took Hayek to be Adam Smith in twentieth-century clothes;<sup>15</sup> Gordon Brown thought it possible to read Smith's teaching, not through Hayek, but alongside the North American liberal political theorists John Rawls (1921–2002) and Michael Sandel.<sup>16</sup> Although the idiosyncrasies of Mr Brown's legacy have continued to be an uncomfortable reality for them,

<sup>7</sup> See below ch 5.

<sup>8</sup> *Budget 2011* (HC 2010–11) 836.

<sup>9</sup> MB Steger and RK Roy, *Neoliberalism: A Very Short Introduction* (Oxford, Oxford University Press, 2010) 19.

<sup>10</sup> *Ibid.*, 24; and R Plant, *The Neo-liberal State* (Oxford, Oxford University Press, 2010) 181–83.

<sup>11</sup> Steger and Roy (above n 9).

<sup>12</sup> D Laws and P Marshall (eds), *The Orange Book: Reclaiming Liberalism* (London, Profile, 2004).

<sup>13</sup> But a contested one: C Petsoulas, *Hayek's Liberalism and its Origins: His Idea of Spontaneous Order and the Scottish Enlightenment* (London, Routledge, 2001); and C Smith, *Adam Smith's Political Philosophy: The Invisible Hand and Spontaneous Order* (London, Routledge, 2006).

<sup>14</sup> S Brittan, 'The Many Faces of Liberalism' *Financial Times: Life and Arts* (23–24 January 2010) 13; M Thatcher, *The Path to Power* (London, HarperCollins, 1995) 50–51; and FA Hayek, *The Constitution of Liberty* [1960], 2nd edn (London, Routledge, 2006).

<sup>15</sup> N Lawson, *The View from No. 11: Memoirs of a Tory Radical* (London, Bantam Press, 1992) 13–14; and I McLean, *Adam Smith, Radical and Egalitarian: An Interpretation for the Twenty-First Century* (Edinburgh, Edinburgh University Press) 91.

<sup>16</sup> R Peston, *Brown's Britain* (London, Short Books, 2005) 21; MJ Sandel, *Liberalism and the Limits of Justice*, 2nd edn (Cambridge, Cambridge University Press, 1998); MJ Sandel, *Justice: What's the Right Thing to Do?* (London, Allen Lane, 2009); and Gordon Brown: *Moving Britain Forward: Selected Speeches 1997–2006*, W Stevenson (ed) (London, Bloomsbury, 2006) 145 and 272.

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Mr Osborne and the Coalition have aspired to a Lawsonian vision of corporation tax, announcing a prospective decrease in the main tax rate of five percentage points.<sup>17</sup> I do not want to make the expression ‘neoliberalism’ do too much work, but it is nonetheless a useful compendious term for an ideology in which economics is king and to which even Sandelian communitarianism is only a qualified reaction.<sup>18</sup> The difference between Coalition and Labour has been one of degree, not of fundamental values.

In this introductory chapter, I offer some thoughts on the constituent elements of the book’s title. These are intended to give readers an idea of my approach. So, with the taxation of corporate profits as my overall subject matter, I want to talk about the relevance to that phenomenon of three elements: the senses in which the expression ‘political economy’ is used; what I mean by theory and values in the corporate tax context; and the background to my unfolding discussion of law reform.

### I. THE SENSES OF ‘POLITICAL ECONOMY’

Uses of the term ‘political economy’ are perhaps unusually sensitive to the contexts in which they appear. One sense in which the term is used is in reference to the actual craft of governing to promote national prosperity.<sup>19</sup> In this sense it is the expression used by politicians to characterise one of their own practices. This is the sense in which Adam Smith used the term when he said that political economy was that part of the sovereign’s task that consisted in providing ‘the state or commonwealth with a revenue sufficient for the public services’, no less than that of maximising the wealth of the subject.<sup>20</sup> It is as such an oxymoron, as Hannah Arendt pointed out: the political ‘stem’ (the *polis*) refers to the Greek for the sphere of state and politics, and the economic ‘tail’ (the *oikia*) to the Greek word for the household and its management.<sup>21</sup> Indeed, economics long consisted of the craft of managing prosperity.<sup>22</sup> After all, Keynesian economics – the contested tradition of John Maynard Keynes (1883–1946) – is specifically directed towards a government’s capacity to create the circumstances under which the subjects of a state might be cushioned against inflation and recession.<sup>23</sup>

<sup>17</sup> *Budget 2011* (above n 8) 56; Finance Bill (No 3) 2011, cl 4–5. On Lawson, see P Riddell, ‘Commentary’ in S Adam, T Besley et al (eds), *Dimensions of Tax Design: The Mirrlees Review* (Oxford, Oxford University Press, 2010) 1284.

<sup>18</sup> Steger and Roy (above n 9) 90; and A Kaletsky, *Capitalism 4.0: The Birth of a New Economy* (London, Bloomsbury, 2010) 40.

<sup>19</sup> Besley (above n 5) 27; S Collini, D Winch and J Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge, Cambridge University Press, 1983) 68 and 136; and Kaletsky (ibid) 78–79.

<sup>20</sup> Smith, *The Wealth of Nations* (above n 2) 5.

<sup>21</sup> H Arendt, *The Human Condition*, 2nd edn (Chicago, University of Chicago Press, 1998) 30 and 33.

<sup>22</sup> Kaletsky (above n 18) 40.

<sup>23</sup> JM Keynes, *The General Theory of Employment, Interest and Money* [1936] (Basingstoke, Palgrave, 2007).

Since the 1890s, people have tended to talk about 'economics' rather than 'political economy'.<sup>24</sup> However, in 2010, noting its widespread contemporary usage, Nigel Lawson welcomed the return of 'political economy' to the lexicon of politics, characterising it as 'consisting in seeking a rational course of action in a world of endemic uncertainty'.<sup>25</sup> In tax policy terms, political economy has given rise to subtly different principles of taxation, all more or less drawing on Smith's maxims, and all resolvable into the values of efficiency and fairness. However, after what socialist critics regarded as the ideologically suspect example of Philip Snowden (1864–1937),<sup>26</sup> the first Labour Chancellor, the practice of political economy seems to have been identified with Conservative and Liberal politicians rather than with Labour ones.

Reflecting the tension in the very idea of a theory, besides referring to what its practitioners should do, political economy may also describe a way of analysing things.<sup>27</sup> It may refer, in other words, to an academic investigation into tax policy and politics using economic modelling techniques.<sup>28</sup> That is the basis on which Besley's political economy is conceived, and it is the broad sense, too, in which Alt, Preston and Sibieta use the term in their useful and innovative chapter in the Mirrlees review.<sup>29</sup> It is itself part of an honourable tradition, broadly configured around the rival insights of welfare economics and public choice theories, or, as in Besley's case, a sophisticated combination of the two.<sup>30</sup>

Public choice is the explanation of government failures through economic analysis: 'politics without romance',<sup>31</sup> as James Buchanan once described it. Welfare economics, the older discipline to which I return in chapter four, is about remedying market failures through particular policies designed to promote the public interest.<sup>32</sup> What political economy of either stripe produces are useful technical insights into the formulation of tax policy. However, as Alt, Preston and Sibieta readily concede, each approach has its limitations. In particular, public choice is difficult to apply to corporation tax, because the tax 'is not typically electorally salient'.<sup>33</sup> Attitudes to corporate taxes cannot therefore be analysed in terms, for example, of median voter models of behaviour.<sup>34</sup> The political commentator Peter Riddell in his essay on Alt, Preston and Sibieta's contribution therefore asserts that it uses 'too much flimsy political science and

<sup>24</sup> Collini, Winch and Burrow (above n 19) 333; Besley (above n 5) 28.

<sup>25</sup> N Lawson, 'Five Myths and a Menace' *Standpoint* (Jan/Feb 2011) 36, 37.

<sup>26</sup> N Thompson, *Political Economy and the Labour Party: The Economics of Democratic Socialism, 1884–1995* (London, University College London Press, 1996) 79–80.

<sup>27</sup> Besley (above n 5) 29.

<sup>28</sup> CS Maier, *In Search of Stability: Explorations in Historical Political Economy* (Cambridge, Cambridge University Press, 1987) 2–6.

<sup>29</sup> J Alt, I Preston and L Sibieta, 'The Political Economy of Tax Policy' in Adam, Besley et al (eds) (above n 17) 1204, 1208 and 1237.

<sup>30</sup> Besley (above n 5) 43–44.

<sup>31</sup> Quoted in Kaletsky (above n 18) 194.

<sup>32</sup> Besley (above n 5) 24.

<sup>33</sup> Alt, Preston and Sibieta (above n 29) 1245.

<sup>34</sup> *Ibid.*

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not enough well-founded history'. It is just testing 'some tendentious theoretical models', only to find them wanting.<sup>35</sup> This is rather harsh, because economic approaches have become widely applied. Chris Sanger, a former Treasury insider, commenting on the Coalition's approach to corporate tax policy, has suggested another approach, one that might get round the occluded nature of corporate tax policymaking: willingness to pay. How much, in other words, is a corporate group 'willing to pay . . . for the benefits that headquartering in the UK brings'?<sup>36</sup> Even this approach, however, has its limitations, since it is still necessary for politicians to decide what to do with the information thereby retrieved. Interviewed by Evan Davis on the BBC, three former Chancellors – Nigel Lawson, Norman Lamont and Alistair Darling – all expressly disavowed the idea of people responding truthfully when asked about their tax policy preferences.<sup>37</sup>

Another academic approach, a version of which I adopt in this study, seems to me to have the potential to illuminate matters further. It draws on the Smithian idea of political economy as that part of the practice of politics that involves making judgments about the rationale of applying in the real world one or another set of economic conclusions. This is the sense in which Nigel Lawson has warmly endorsed the use of the expression. So I utilise the findings of Besley's political economy, as well as of the Mirrlees review itself, and read them alongside political science and public law material. What factors, in other words, will affect the prospects of Mirrlees' conclusions being applied in the real world? In so doing, I discuss two key contributions: that of Christopher Wales, another former Treasury adviser,<sup>38</sup> and that of the IFS's own committee on the reform of the process by which tax law is made.<sup>39</sup> I want to show how concepts of public law – the law of the state and the subject – founded as they are in politics, assist in the deployment of theoretical economic knowledge. So I refer to Alt, Preston and Sibieta, to be sure, but I give prominence to these other two studies. It is crucially important that the conclusions of Mirrlees are not ignored, even though early signs have not been encouraging.<sup>40</sup> In mapping the relationship between the conclusions of economics and the constraints, and potential, of politics and public law, it may be that an analysis such as the present ensures that Mirrlees continues to be discussed. This may seem like – but is not intended to be – a condescending comment. Mirrlees has certainly had an

<sup>35</sup> Riddell (above n 17) 1280. See also B Manin, *The Principles of Representative Government* (Cambridge, Cambridge University Press, 1997) 224–25; and Loughlin, *Foundations of Public Law* (above n 6) 10.

<sup>36</sup> C Sanger, 'Corporate Tax Road Map' (2011) *British Tax Review* 2, 3.

<sup>37</sup> E Davis, 'The Overall Burden of Tax' *Evan Loves Tax* (BBC Radio 4, 13 September 2010), details available at <http://www.bbc.co.uk/news/business-11275040> (accessed 30 March 2011).

<sup>38</sup> C Wales, 'The Implications of the O'Donnell Review for the Making of Tax Policy in the UK' (2004) *British Tax Review* 543.

<sup>39</sup> Tax Law Review Committee, *Making Tax Law: Report of a Working Party on the Institutional Processes for the Parliamentary Scrutiny of Tax Proposals and for the Enactment of Tax Legislation chaired by Sir Alan Budd* (London, Institute for Fiscal Studies, 2003).

<sup>40</sup> Sanger (above n 36) 10.

impact. Indeed, aspects of Alt, Preston and Sibieta's analysis quickly proved influential – their recommendation for an Office for Budget Responsibility was acted on almost immediately when the Coalition took office in May 2010.

So, the political economy of corporation tax, as I portray it, is the analysis of the exercise of political judgment in relation to the application of economic theory to corporate tax policy. It includes those cases where, as some would say, economic theory is all but disregarded in the making of the political judgment. This approach gives a prominent role to politics that not all would accept, but it provides too a context for material that might otherwise seem quite remote from everyday concerns.

## II. FIRST THOUGHTS ON THEORY AND VALUES

Corporation tax is, of course, unusual, since it is the only one of the main taxes whose subjects are not – at least, not obviously – creatures of flesh and blood. The taxable person is the limited liability company, or corporation, thought by some to be the most distinctive artefact of the nineteenth-century legal imagination, and now prominent in all developed societies. Indeed, as has often been argued, it would be possible to scratch-build a system that did not include a tax on corporations but relied instead on the income tax liability of the creatures of flesh and blood who have economic interests in companies.<sup>41</sup>

Yet such is not the system we have. This suggests a gap between what we hope for and what actually happens – a gap that this study tries to account for in terms of the realities of politics and the ordering of those realities in public law. The realities have a number of constituent factors: that the public or national interest in corporate taxation is not necessarily the same as what business wants; that the initiation of tax policy by ministers of the Crown tends to be surrounded in secrecy, being in the true sense of the word 'arcane'; and that corporate tax, unlike income tax, has not hitherto been susceptible to the economic analysis of voter preferences.

The gap between what we hope for and what we actually get therefore needs to be conceptualised in some way that anatomises the nature of the engagement between the corporate sector and the government. This, I contend, is the province of theory, in the sense of a particular perspective on corporate taxation. I analyse the choices between corporate tax policies in terms of the insights of politics and history, of how political prudence shapes the divergence in the public sphere between the ideal and the reality. There is no doubt a range of ways of explaining that disparity, and I do not pretend to offer a definitive account. Nevertheless, the reasons for evaluating the purely economic arguments in, for

<sup>41</sup> J Kay and J Sen, 'The Comparative Burden of Business Taxation' (1983) 4(3) *Fiscal Studies* 23; and M Gammie, 'Reforming Corporate Taxation: An Evaluation of the United States Treasury Integration Proposals and other Corporate Tax Systems in an International Context: Part 1' (1992) *British Tax Review* 148, 149. See below ch 2.

instance, Auerbach, Devereux and Simpson's contribution to the Mirrlees review<sup>42</sup> in the light of politics and public law, as unfolded in these pages, seems to me to be compelling. This is why, as Christopher Wales has pointed out, the economics of corporate tax can never be divorced from politics<sup>43</sup> and why Riddell has written that 'tax decisions cannot be taken out of politics'.<sup>44</sup> Indeed, Mr Sanger's comment on the Coalition's commitment to the principle of taxing companies<sup>45</sup> rather than their shareholders direct implies that it is an essentially prudential position: people think 'it is right', he acknowledges, that 'businesses should pay tax'.<sup>46</sup> This type of argument does not diminish the importance of the economic analysis of political decisions on taxation. It merely asserts that such economistic analyses – as for instance Alt, Preston and Sibieta's political economy – are not the only way of critiquing such decisions.

When I use the word 'economistic', I am referring to all discussions of corporate tax in which the non-exclusivity of economic analyses is not given weight, and motivations are instead reduced to essentially economic preferences. Whether, as Charles Taylor has said, such an economism is symptomatic of a generally misplaced faith in scientific methods,<sup>47</sup> I leave open. But I do not agree with Alt, Preston and Sibieta's premise that the assertion that something is 'political' means it is incapable of systematic non-economistic analysis.<sup>48</sup> I simply argue that, even with corporate taxation, the economistic analysis, though foundational, is not exclusive, and a systematic public law critique can be constructed. Interestingly, the overall tone of the Mirrlees review is much more contextual, if not more political, than its predecessor, the rather technical Meade report of 1978,<sup>49</sup> so the nature of my own work is very much in keeping with the general drift of the contextual study of tax policy over recent decades. The fact that companies rarely operate alone, that most are members of corporate groups and that as multinationals they cross national borders, is another reason for taking a more contextual approach, if only because of unprecedented levels of public concern about multinationals' supposed domination of corporate tax policy.<sup>50</sup>

So-called 'optimal tax theory' is the theory that, taking account of certain 'constraints', it is possible to model the best possible way of achieving tax policy objectives.<sup>51</sup> A creation of welfare economics, it is deployed as the highly

<sup>42</sup> AJ Auerbach, MP Devereux and H Simpson, 'Taxing Corporate Income' in Adam, Besley et al (eds) (above n 17) 837.

<sup>43</sup> C Wales, 'Commentary' in Adam, Besley et al (eds) (above n 17) 1304.

<sup>44</sup> Riddell (above n 17) 1293.

<sup>45</sup> Sanger (above n 36) 6.

<sup>46</sup> *Ibid.*, 5.

<sup>47</sup> Quoted in Loughlin, *Foundations of Public Law* (above n 6) 10.

<sup>48</sup> Alt, Preston and Sibieta (above n 29) 1208.

<sup>49</sup> JE Meade (Chair), *The Structure and Reform of Direct Taxation: Report of a Committee Chaired by Professor JE Meade* (London, George Allen and Unwin, 1978) ch 12.

<sup>50</sup> But (soberingly) see BBC Radio 4, *The Report* (30 December 2010), details available at <http://www.bbc.co.uk/Radio4> (accessed 21 Feb 2011).

<sup>51</sup> Mirrlees, Adam and Besley et al (above n 3) 19.



sophisticated basis of the Mirrlees review's recommendations. But it needs to be further contextualised in order to engage public concern. The constraints of which it takes account are 'administrative' and 'political' (eg, the so-called 'revenue constraint', EU membership, etc). Such factors are important, to be sure, but they are not exhaustive, and they do not purport to lead ineluctably to one conclusion or another. Moreover, as we shall see, some such 'constraints' – for instance, EU membership – can actually in the prism of politics be enabling from the government's point of view. In short, therefore, optimal tax theory is not all there is to say about corporate tax policy. It is in danger of dominating discussion, however, because of the generally technical nature of corporate tax discourse. The lack of public understanding of, as well as the lack of wide public involvement in, debates about taxes is a lament of the Mirrlees review itself.<sup>52</sup> A wider, contextual discussion should help to redress the balance. At a profound level, taxation depends upon public consent, if only in its highly stylised parliamentary form. That is why it is never helpful to invoke Colbert's non-consensual doctrine of taxation as the art of extracting the most goose feathers with the least hissing.<sup>53</sup> Taxation has to command consent, which implies a level of public support, which in turn requires a public understanding of the issues.<sup>54</sup>

If the role of theory is to enable the prudential evaluation of different economic possibilities in complex real world-settings, then it remains to say something about values. In this book, values are taken to embody ideological choices about the way we should live, choices settled in large part by the neoliberal ideology already discussed.<sup>55</sup> All positive law of course embodies values in this sense, but critical discussion of them is perhaps most closely associated with public law scholarship.<sup>56</sup> The relevance of values to this study is the result of linking corporate tax policy and tax law to general public law and policy. The role of the theory it propounds is to help both politicians and critics to assess the limitations of otherwise clear conclusions of economics. It also enables each group to sift between the different possibilities that economic models suggest. Theory provides, in other words, an explanation for the choices actually made as between different economic possibilities. Since the possibilities can be analysed in terms of various combinations of efficiency and fairness, some traces of these values are always detectable in the legislative code as it actually exists. Efficiency predicates that corporate taxes do not hamper economic growth, and

<sup>52</sup> Alt, Preston and Sibieta (above n 29) 1206; and Wales, 'Commentary' (above n 43) 1301.

<sup>53</sup> Eg, K Ussher and I Walford, *National Treasure* (London, Demos, 2011) 43. Jean-Baptiste Colbert (1619–83) was the finance minister of the absolutist and fiscally inept regime of Louis XIV.

<sup>54</sup> Wales, 'Commentary' (above n 43).

<sup>55</sup> A Sen, *Development as Freedom*, 2nd edn (Oxford, Oxford University Press, 2001); and N Scott Arnold, *Imposing Values: An Essay on Liberalism and Regulation* (Oxford, Oxford University Press, 2009).

<sup>56</sup> P Cane, 'Theory and Values in Public Law' in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford, Oxford University Press, 2003) 3; and P Craig, 'Theory and Values in Public Law: A Response' in Craig and Rawlings (eds) (above) 23.

fairness suggests that they reflect a politically appropriate tax burden for the corporate sector to bear.<sup>57</sup>

The content and scope of corporation tax values are shaped in part by the institutions of government and in part by political processes. The corporation tax code itself therefore embodies both the ancient prudence of the institutions themselves and the prudential choices made in the policymaking process. This aura of history indeed was very apparent until the period 2001 to 2010, when except for chargeable gains the fragmented legislation of earlier years was consolidated and rewritten – but not amended – in four Tax Law Rewrite Acts: the Capital Allowances Act 2001; the Corporation Tax Acts 2009 and 2010; and the Taxation (International and Other Provisions) Act 2010.

Political prudence, as a crucial factor in shaping corporate taxation, forms a tangible link between our ideas of government and those of Adam Smith and his friend David Hume (1711–76), as well as three earlier thinkers crucial to their own thought, Niccolò Machiavelli (1469–1527), Thomas Hobbes (1588–1679) and John Locke (1632–1704). All five, in different ways, were searching for a way to ensure an appropriate ordering of the state. Hume and Smith believed that its spontaneous ordering would come from the prudential dismantling of ancient restrictions on commerce; for Machiavelli and for Hobbes, right ordering could be achieved only by the sovereign's prudent wielding of the sword; and for Locke, good order required the prudential limitation of the prerogatives of the Crown. Structuring the discussion in this book around conceptions of prudence at different historical stages gives consistency and robustness to an argument such as Riddell's about the importance of history in understanding the outcomes of tax policy today.

The discussion therefore follows a course marked out by the public lawyer Martin Loughlin. Loughlin, a legal academic with a profound sense of history, steeped in the intellectual tradition I have just described, has been moved to evolve over two decades a broadly Hegelian analysis of public law,<sup>58</sup> incorporating insights from another Hegelian thinker, Michel Foucault (1926–84). In Hegelian thought, political right is 'an elaboration of the working of reason in history'.<sup>59</sup> My own study reflects this Hegelian perspective, but it is Foucauldian only to the extent that Loughlin makes selective use of Foucault's work. It is to Loughlin's thinking that I turn next, in the context of the background to the third component of the book's title: law reform.

### III. CORPORATE TAX LAW AND ITS REFORM

Throughout this study, I present corporate taxation as a species of public law. This statement should be understood in both narrow and wide senses, to be

<sup>57</sup> But see Mirrlees, Adam and Besley et al (above n 3) 6.

<sup>58</sup> Loughlin, *Foundations of Public Law* (above n 6) 154.

<sup>59</sup> *Ibid.*, 147.