EQUALITY, TAXATION, AND LAW AND ECONOMICS IN THE 21ST CENTURY

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ABSTRACT: Inequality is one of the defining issues of our time. Nevertheless, orthodoxy among public policy scholars, prominently including those in law and economics, has long been that all areas of the law but one should do nothing to address inequality. That one area for distributional concerns is using taxation to transfer cash from rich to poor. Transferring only cash lets the recipient choose what to get and the payer choose what to give up, allowing the rest of policy to focus on growing the overall size of the economic pie.

Unfortunately, our standard approach is deeply at odds with social reality, so it yields bad policy prescriptions that fail to address or even magnify inequality. Ordinary people don't think about policy like economists do, fungibly trading off redistribution through one means or another. Instead, people view policies through their own internal norms. For tax policy, people commonly think that the poor do not deserve free cash and the rich deserve a decent share of their income, thwarting sufficient redistribution through taxation. A democracy where Congress is attentive to such views will need to look elsewhere to achieve distributive justice.

The Article turns standard economics prescriptions on their heads. Rather than never redistributing, as standard law and economics prescribes, nontax policy typically should redistribute: decentralized political actors typically should each modestly tilt policies toward the poor. The Article takes citizen psychology seriously and develops policy prescriptions based on it to reveal how to redistribute, given the tradeoffs presented by standard efficiency concerns. The Article points the way forward for policymakers who care about addressing inequality, describing implications across federal regulatory cost-benefit analysis, social welfare policy, traditional legal rules, and elsewhere.

Table of Contents

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INTRODUCTION

We confront widespread alarm about inequality in America. Voters list it as one of their major concerns.[1] Politicians across the political spectrum describe a "rigged" economy.[2] There is

[1] *See, e.g.*, PEW RESEARCH CENTER, THE GENERATIONAL GAP IN AMERICAN POLITICS 18 (2018), http://www.people-press.org/wp-content/uploads/sites/4/2018/03/03-01-18-Generations-release.pdf (noting that 62% of survey respondents felt that the U.S. economic system unfairly favors powerful interests, and 82% felt that income inequality in the U.S. was either a very big or moderately big problem).

[2] Republicans have increasingly expressed concern about rising inequality, even before President Trump's populist rhetoric during the 2016 campaign. For example, Mitt Romney, Jeb Bush, and Rand Paul all complained about the continuing rise in inequality during the Obama presidency. *See e.g.* Catherine Rampell, *Republicans Have Started to Care About Income Inequality*, WASH. POST (Jan. 22, 2015), https://www.washingtonpost.com/opinions/catherine-rampell-republicans-have-started-to-care-about-income-inequality/2015/01/22/f1ee7686-a276-11e4-903f-9f2faf7cd9fe_story.html?utm_term=.92d3a15e5c57.

a sense that the American Dream is not what it once was.[3] What should be done?

One prominent method of analysis for answering this question among the policy elite that staffs Washington DC think tanks,[4] advises political candidates and elected officeholders,[5] and implements policies such as regulatory cost-benefit analysis is the economics approach.[6] It is appealing because it addresses tradeoffs between various options, reflecting the reality of resource constraints.[7] Every dollar that the government raises can only be used on one thing. It claims to have a theory of the whole and a prescription for each part. This thinking is so standard among economic policy elites across the country that it has been called the "Brookings religion."[8]

The approach in economics cares about distribution, but—in imagining one "benevolent dictator" who makes policy[9]—makes an assumption about how politics function that essentially shuts down virtually all tools but one for addressing distributive concerns.[10] That one tool is cash taxes and transfers, since cash lets recipients choose what to spend money on and payers choose what to give up. With distribution taken care of, all other policies can tidily ignore distributional concerns and instead focus on "efficiency," roughly maximizing the size of the economic pie.[11] Crucially, these efficient nontax policies should not be concerned with distribution. With a limited budget, economics says, such a method does the most social good. The method is analytically clean: it dictates the right policy. And it (on its account) avoids wading into thorny distributional debates, since whatever the right distribution is, taxes should and can address it. In its place, economics leaves the neutral-seeming goal of "efficiency" for nontax policies.

The thesis of this Article is that this standard approach is empirically naïve in ignoring the real-world politics that arise from how ordinary Americans think about economic policy and that economics thus makes erroneous, inegalitarian policy prescriptions.[12] Changing just one

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[3] Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility,* 104 AM. ECON. REV. 141 (2014) (discussing the decline of intergenerational mobility in the US).

[4] *See*, for example, the large number of economists at think tanks. *See, e.g.* Brookings Institution, *Experts* (2020), https://www.brookings.edu/experts/; American Enterprise Institute, *Our Scholars* (2020), https://www.aei.org/our-scholars/; Peterson Institute for International Economics, Experts (2020), https://www.piie.com/experts.

[5] *See, e.g.,* The White House, *Council of Economic Advisers: Staff* (2020), https://www.whitehouse.gov/cea/staff/.

[6] *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1994) (requiring cost-benefit analysis based on efficiency in federal agencies). *See generally* Tyler Cowen, *Where in the Federal Government Do the Economists Work?*, MARGINAL REVOLUTION (Jan. 17, 2011) https://marginalrevolution.com/marginalrevolution/2011/01/where-in-the-federal-government-do-the-economists-work.html (describing the outsized influence of economists on government, explaining there were 4,130 individuals with "economist" in their title in the federal bureaucracy in 2008, excluding the Federal Reserve); Justin Fox, *How Economics PhDs Took Over the Federal Reserve*, HARV. BUS. REV. (Feb. 3, 2014), https://hbr.org/2014/02/how-economics-phds-took-over-the-federal-reserve (describing how economists took over key Federal Reserve leadership positions).

[7] LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2009) (describing the approach).

[8] Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1651 (2018). *See also* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 6-21 (2019) (discussing the "Triumph of the Technocrats" across the Reagan, Clinton, and Obama administrations); Richard A. Posner & William M. Landes, *The Influence of Economics on Law: A Quantitative Study,* 51 (Chi. L. & Econ. Working Paper No. 9, 1992) ("[T]he growth in the influence of economics on law exceeded that of any other interdisciplinary or untraditional approach to law . . . .").

[9] N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 145 (7th ed. 2015).

[10] Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); KAPLOW & SHAVELL, *supra* note 7; A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 127 (2d ed. 1989); ROBERT COOTER AND THOMAS ULEN, LAW & ECONOMICS 7–8 (6th ed.2012).

[11] *See* discussion of "Kaldor-Hicks efficiency" in *infra* note 26 and surrounding text.

[12] The Article focuses on the United States. The claim is a contingent, particular one, and it could change with time.

assumption in conventional law and economics radically changes the prescriptions, opening up a world of egalitarian opportunities.

Building on budding work in behavioral economics,[13] the Article introduces the "theory of separate public accounts:" the idea that people have durable, partially compartmentalized category-specific views about good policy that do not reflect a holistic vision of tradeoffs across policies.[14] That is, while the standard economics approach assumes that the best policy option (cash) is best because of a complex optimization across countless policy choices, ordinary people do not think that way. They have separate distributive views about separate policies.

The Article focuses on the public account for taxation of "earned" income—that is, income from labor (not capital)—because it is supposed to be *the* means of achieving distributive justice.[15] In particular, in this "tax public account," pretax income generates "desert:"[16] If you do not work, you are deemed less deserving of cash transfers. And, if you make a lot of money, you should be able to keep a decent share of your income. As a result, redistribution through income taxation is not an available means of achieving full distributive justice.

This one simple, even intuitive, view transforms economic policy prescriptions. Current thinking holds that we can judge how redistributive voters want overall policy to be from looking at income tax policy. With the desert-based tax public account, this view is incorrect. Rather, because taxation is its own process with its own norms, voters may wish less redistribution here and more elsewhere, in a different public account, for instance in the form of "necessities" like food, housing, education, and transportation. If taxes reflect desert, then vindicating notions of distributive justice will require alternative policies, and policymaking should respond accordingly. The tidy analytic prescription specifying that Congress address distributive issues through taxes while all other policies ignore distribution and maximize efficiency is doomed to failure.

The Article shows how this one single factor dramatically limits the prescriptive power of economics. Once distribution matters, a host of thorny questions—and ones that economists have little expertise in answering—arise: What is the right distribution of resources? How does one know that? What are legitimate means of redistribution? What is "redistribution" relative to? Is it even a well-framed question to ask what the right distribution of resources overall is? These questions are largely held at bay if taxes address distribution. Economics turns out to be a much more fragile and fallible tool for prescribing policy than typically is assumed. What works in the abstract world with one social planner is far more challenging on the ground, in a real legal system. This is especially so if we lend credence to the widespread demands for increased equality, as that may be considerably more important than the efficiency consequences on which economists overwhelmingly base their policy recommendations.[17]

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[13] *See, e.g.*, Richard H. Thaler, *Anomalies: Saving, Fungibility, and Mental Accounts*, 4 J. ECON. PERSP. 193 (1990) (arguing mental accounts prevent people from thinking about money as fungible across types of wealth); Section II.

[14] *See infra* Section II.A.

[15] KAPLOW & SHAVELL, *supra* note 7; N. Gregory Mankiw et al., *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSP. 147 (2009).

[16] *See generally infra* Section II.B. *See also* SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE (2013); Matthew C. Weinzierl, *Popular Acceptance of Inequality Due to Innate Brute Luck and Support for Classical Benefit-based Taxation,* 155 J. PUB. ECON. 54 (2017).

[17] *See supra* notes 1-2 (discussing concern with inequality); Jason Furman, *Should Policymakers Care Whether Inequality Is Helpful or Harmful for Growth?*, *in* EVOLUTION OR REVOLUTION? RETHINKING MACROECONOMIC POLICY AFTER THE GREAT RECESSION 229 (Olivier Blanchard & Lawrence Summers eds., 2019) (describing how the important policy margins now are often about equality rather than growth).

How then should policymakers address widespread egalitarian concerns about distribution? And how can the tools of economics be helpful? The Article lays out an agenda of three policy options, all within the context of acknowledging the huge number of unknowns, most prominently about appropriate distributions but also more generally about a host of other value judgments that arise when efficiency is no longer always the prescription. The first policy is education and reframing. To the extent that current lay views are mistaken and allowing people choice in how they receive transfers and provide resources is good, we should seek to achieve that. Much work needs to be done understanding the precise contours of desert-based thinking and how changeable those ideas are, but these economic arguments are old, and their importance is longstanding. So, given the urgency of equality concerns, it may be unwise to simply wait for the cash policy option to be available.

The second set of policy options tries to approximate cash. For example, if the first-best is cash and taxes are based on desert in pretax income, then adopting policies that are cash-like but outside the tax public account could be good policy. That is, some policies can de facto redistribute cash without appearing to do so. For example, a "necessities account" that can only be used on necessities like food, utilities, commuting, housing, clothing, education, and healthcare would be close to a cash transfer without looking that way because the poor mostly spend money on those things anyway.[18]

Third, tilt policies toward the worse-off: Adopting a "thousand points of equity" strategy would make the myriad nontax policies modestly more redistributive where such a change would not conflict with other important values like legality or legitimacy. Importantly, doing a little bit in a lot of places is, all else equal, better than doing a lot in a few places because of the diminishing returns of helping the poor in any given area as the tilt increases.[19] So, to get the most distributive bang for the buck given limited resources, we should not put our distributive eggs in one basket. Furthermore, because modestly considering equity does not harm efficiency much, the downsides of such an approach are limited. In all three of these policy options, a host of important empirical and normative questions surface that lay fallow under the standard economics approach.

Before continuing, I address two things. First, while the Article provides baseline guesses and does assume egalitarian goals of helping the less well-off, it cannot say what the right distribution of resources is. Indeed, the presence of separate public accounts puts pressure on the notion that such a unidimensional ideal distribution could be discerned from the population.

Second, the Article does not make a claim about the appropriate normative place of desert in pretax income. For the most part, though this claim matters greatly for good income tax policy, it does not matter for good *nontax policy*. The claim here is only an empirical one: because of desert-based thinking in the tax public account, redistribution through income taxation is limited in practice.[20]

This Article makes three main contributions. The first is disturbing our notions of what we can infer from tax policy about distributive attitudes. With tax-based public accounts, we cannot depend on taxes to achieve whatever overall notion of distributive justice we have, since

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[18] *See* Jacob Goldstein, *How The Poor, The Middle Class And The Rich Spend Their Money,* NPR (August 1, 2012), https://www.npr.org/sections/money/2012/08/01/157664524/how-the-poor-the-middle-class-and-the-rich-spend-their-money (showing that the poor overwhelmingly spend their money on such "necessities").

[19] JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY (2005).

[20] To the extent that taxation based on desert in pretax income is a mistake, this is a "second-best" approach. *See* Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

taxes in part reflect tax-specific norms. The second is developing the theory of separate public accounts, explaining the evidence for it, and pointing the way toward a series of empirical questions that can help policymakers understand what policies to adopt in a world of separate public accounts. The third is developing policy recommendations for policymakers who want to enhance equality but are also attentive to resource constraints and trade-offs. A key question for any legal system is how the various pieces fit together to achieve distributive justice. This question is trans-substantive, since the best ways to achieve equity may be in a variety of legal domains. That is, the Article is both an internal critique and a set of prescriptive possibilities applicable to those broadly interested in achieving greater equality under the reality of resource and political constraints.

The Article proceeds as follows. Section I describes the standard view of the way to address distribution in law and economics: efficient nontax policies and "optimally" redistributive taxes. Section II develops the theory of separate public accounts and applies it to desert in taxation. Section III describes the broad implications of the tax public account. Section IV offers three prescriptive possibilities: advocating, approximating, and tilting. Section V considers several important factors in policy design. Section VI addresses critiques.

I. THE STANDARD VIEW IN ECONOMICS: "ONE-PIEISM"

The standard economic perspective for recommending economic policy is typically "welfarist" or "utilitarian": estimate each individual's subjective well-being and aggregate.[21] The goal is to recommend the set of welfare-maximizing policies that is best for society among all possible combinations of policies, as if there were one metaphorical benevolent dictator implementing them.[22] This Article describes difficulties of using the standard means prescribed to address widespread equality goals. This Section describes how a welfare-maximization analysis is typically conducted in economics now.

A. Efficient Nontax Policies

The standard analytical approach in economics, especially law and economics, is what this Article calls "one-pieism"—the idea that there is one economic pie to be maximized consisting of perfectly commensurable stuff, rather than separate pies for cash transfers, healthcare, treatment by tort law, and the panoply of other "in-kind" (i.e., non-cash) government provisions and regulations.[23] The goal of government policy is to find the most "efficient" way—across all possible means—to arrive at a just distributive end. In other words, all that matters are the size and distribution of the slices, not what's in the pie, since all of the pie's policy ingredients are perfectly commensurable. In this framework, the standard argument is that cash

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[21] *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 117-22, 817-50 (1995); Lewis Kornhauser, *The Economic Analysis of Law*, 6 STAN. ENCYCLOPEDIA PHIL. (2017) ("The evaluative tradition in economics is resolutely welfarist.").

[22] *See* MANKIW, *supra* note 9, at 145. *See also* Marion Fourcade et al., *The Superiority of Economists*, 29 J. ECON. PERSP. 89, 107-08 (suggesting that economists tend to "mak[e] it their mission to maximize the welfare of ordinary people," with a "fix it" culture and "an orientation toward policy adjudication and advice, and a distinctive willingness, even eagerness to serve and intervene").

[23] *See* Oren Cass, *Economic Piety Is a Crisis for Workers*, ATLANTIC (Nov. 27, 2018), https://www.theatlantic.com/ideas/archive/2018/11/emphasize-production-not-consumption/576625/ (describing the emphasis on economic growth in policymaking outside of taxes and transfers).

taxes and transfers are typically the most efficient means of redistributing.[24] All other policies should be efficient.[25]

The one-pieist argument proceeds in two steps—first, efficient nontax policies, and second, "optimal" taxes. By "efficient" nontax policies, I mean the "Kaldor-Hicks" definition in which the optimal policies are those that maximize the sum of each individual's willingness to pay to avoid harm and bring benefits to herself, given the existing distribution of wealth.[26] That is, aggregating willingness to pay across everyone and finding the policy with the highest sum maximizes efficiency. Distributional concerns play no role.

The key intuition for redistributing with cash through taxation rather than redistributing with in-kind goods, services, or legal rules is that cash lets the poor choose what to spend the money on, thus increasing the likelihood that the resources are used in the way that most makes them better off. By the same token, using taxes to decrease the cash income of the rich rather than removing some legal entitlement they may value highly aims to harm the rich the least and thereby be able to redistribute more to the poor. Given that the government has limited resources and thus faces trade-offs in how it addresses equality, cash—and thus taxes—is viewed as the superior means of redistribution. Other policies should be efficient, in order to maximize the size of the pie so that everyone's pieces are as large as possible.

Consider the example that runs throughout the Article of regulatory cost-benefit analysis of transportation spending. The federal Department of Transportation's longstanding practice for distributing grant funds across projects is to conduct cost-benefit analysis to determine where money is best spent and then spend it there. The most important factor in the analysis is the "value" of time saved. Currently, saving the time of relatively poor people on buses counts for $25 per hour.[27] Saving the time of richer people at airports counts for well over twice as much: $63 per hour. This practice tends to push transportation spending toward the rich instead of the poor. How can this be, despite the essential need of the poor to get to work to achieve economic mobility?[28] It is efficient: the rich, with their higher wages, are willing to pay to reduce their commutes.

Suppose, for example, that the government has enough money to save one hour of commuting time for some people. It can spend that money exclusively on the rich, exclusively on the poor, or split between the rich and the poor (helping each group in proportion to the amount

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[24] Kaplow & Shavell, *supra* note 10. Even more stringently, the taxes need to be on labor income. Alan J. Auerbach & James R. Hines Jr., *Taxation and Economic Efficiency*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1347 (Alan J. Auerbach & Martin Feldstein eds., 2002) (describing the Atkinson-Stiglitz result that, under a certain set of assumptions, there should be no taxes on capital).

[25] Though this is the dominant view, there have been a variety of internal critiques to this view as well. *See* Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2481 (2013) (describing how redistribution through legal rules can be more efficient); Chris Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View,* 29 J. LEGAL STUD. 797, 805-06 (2000) (similar). This Article differs from earlier work in that these works accepted the basic framework of finding the most efficient opportunities for redistribution among all possible choices. This Article, in contrast, rejects that framework as conflicting with social reality.

[26] *See* Lewis A. Kornhauser, *Wealth Maximization*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 679–84 (Peter Newman ed., 1998) (describing Kaldor-Hicks efficiency); Liscow, *supra* note 8, at 1652 (same).

[27] The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update), 17 (US Department of Transportation, Sept 27, 2016) (providing recommended hourly values of time travel savings).

[28] Mikayla Bouchard, *Transportation Emerges as Crucial to Escaping Poverty,* N.Y. TIMES (May 7, 2015) (describing work by Raj Chetty and co-authors in which "commuting time has emerged as the single strongest factor in the odds of escaping poverty").

of money the group receives). And suppose for simplicity that all time savings cost the same amount. Whom should the money be spent on?

The standard economics answer is that the money should *all* be spent on the rich. That might seem completely unfair. But the economist's answer is that doing so makes everyone better off because the rich can work their extra hour, earn an extra $63, and then transfer at least $25 of it to the poor, so that both parties are better off. The poor get more than they would have earned if they had worked because of the cash transfer, and the rich have plenty left after the transfer. Put differently, the two parties—rich and poor—should strike a trade that makes both better off:[29] both will accept an efficient transportation spending rule, and the rich will pay more in taxes that will be received by the poor.

This two-step analysis has a more common lay description: maximize the size of the pie and then divide it up equitably. One sees such reasoning, for example, in the context of international trade: we should have free trade, maximize the size of the pie, and then divide up the pie to achieve a fair distribution.[30]

Efficiency reasons may still dictate government provision of nontax benefits. For example, in reality, there will be some low-cost, high-time-savings investments for the poor, so they will get some funds. But the spending is heavily tilted toward the rich, since their time counts for over twice as much. (See the Appendix for a formal model and numerical example.) Information problems in insurance markets can justify a significant role for the government in healthcare provision.[31] And sometimes it can be efficient to provide in-kind benefits (like low-end housing) rather than cash ones to "target" the truly poor, who would be especially willing to accept the in-kind benefits.[32] One can spin myriad arguments. But they all have one thing in common: the reason for providing noncash benefits is efficiency.

The standard story thus boils down policy into one pie made up of the willingness to pay of each individual for the slice of harms, public goods, and income that she receives. The views of the general population about what is in the slices (e.g., healthcare and environmental health versus bananas and automobiles) play no role. And the process by which the final arrangement comes about—whether people, say, have income because they worked for it or because they received it from the government[33]—also plays no role.

B. Redistribution Through Taxes

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[29] KAPLOW & SHAVELL, *supra* note 7; Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281 (2001).

[30] *See, e.g.*, N. Gregory Mankiw et al., *An Open Letter*, GREG MANKIW'S BLOG (Mar. 5, 2015), http://gregmankiw.blogspot.com/2015/03/an-open-letter.html (open letter from more than a dozen prominent economists to congressional leaders arguing that "[t]rade is beneficial for our society as a whole, but the benefits are unevenly distributed" yet "economy-wide benefits resulting from increased trade provide resources[,]" which can be used to "help[…] those who are adversely affected"); Robert Whaples, *The Policy Views of American Economic Association Members: The Results of a New Survey*, 6 ECON. J. WATCH 337, 340 (2009) (finding support among economists for the position that the U.S. should continue to liberalize trade and increase support for affected workers).

[31] GRUBER, *supra* note 19.

[32] Janet Currie & Firouz Gahvari, *Transfers in Cash and In-Kind: Theory Meets Data,* 46 J. ECON. LITERATURE 333, 341-342 (2008).

[33] Of course, the fact that working for money involves costly labor would be factored into the analysis. But the income itself would be treated the same.

Returning to the example of the transportation spending, few are so unrealistic as to imagine that the Department of Transportation itself would make cash transfers to the poor when it spends on the rich instead. It lacks such legal authority. Instead, the two-step process is that the cash will typically be transferred through the income *tax and transfer system*, in ways not specifically tied to the transportation spending but rather in ways that will roughly yield fair distributions on average in the end.[34] "Optimal" taxes use a social welfare function that aggregates individuals' utilities to determine the taxes that each person pays. The goal is to raise a given amount of money for public goods while also "redistributing" income from the rich to the poor through taxes and transfers on "earned," or labor, income. (Capital income rates are traditionally viewed as inefficient and thus a bad means of redistributing.[35]) These optimal taxes are the taxes and transfers that the prescription of "efficient nontax policies" depends upon.[36]

The modern theory of optimal taxation dates to the 1970s.[37] This development was well before the advent of behavioral economics, when considering rational, self-interested individuals with simple tastes was standard: individuals want to consume more, and they do not care about how redistribution should take place.[38] Optimal tax theory has played an important role in the development of modern law and economics as its distributive underpinning.[39] Economists have now extensively studied the tax rates required to achieve a utility-maximizing distribution of income, given the behavioral response to taxation,[40] though this optimal taxation literature has received little notice in the legal literature outside of tax scholars themselves.[41] This Article is the first to carefully juxtapose that high level of predicted redistribution with the substantially more modest redistribution we see in reality, and draw out implications for policy *outside of taxation* with distributional consequences.

Redistribution in optimal tax theory is driven by the poor's higher "marginal utility" of consumption, though this great social value of resources in the hands of the poor could also be seen as reflecting broader equality concerns for a variety of reasons.[42] Optimal redistribution does not fully equalize income because, under such a scheme, incentives to work would be so dulled that welfare would actually decrease because there is less to redistribute to the poor. Importantly, essentially only three things are taken to matter when setting optimal taxes: raising revenue to provide services, keeping tax rates low enough to maintain incentives to work, and achieving fair post-tax outcomes through redistribution. Of course, there is no exact agreement

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[34] KAPLOW & SHAVELL, *supra* note 7, at 24-27.

[35] The traditional view has been to have low, possibly even zero, tax rates on capital income. Mankiw et al., *supra* note 15. That view is under some flux. Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. ECON. PERSP. 165 (2011). But, in any case, under the standard view, taxes on capital are ideally peripheral to redistribution. For the purpose of this Article, view capital income as in the same category as "nontax" legal rules, as it is not a tax on labor income.

[36] Liscow, *supra* note 8, at 1664; Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2015).

[37] James A. Mirrlees, *The Theory of Optimal Taxation*, *in* 3 HANDBOOK OF MATHEMATICAL ECONOMICS 1197 (Kenneth J. Arrow & Michael D. Intriligator eds., 1986) (describing the classic treatment).

[38] Richard H. Thaler, *Behavioral Economics: Past, Present, and Future*, 106 AM. ECON. REV. 1577 (2016).

[39] Kaplow & Shavell, *supra* note 10.

[40] Mankiw et al., *supra* note 15, at 147 (summarizing the literature); Diamond & Saez, *supra* note 35 (disagreeing in some respects, but establishing many points of consensus).

[41] For an example of tax scholars' discussion of optimal taxation, *see* Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905 (1987).

[42] Lily Batchelder, *Optimal Tax Theory as a Theory of Distributive Justice*, (draft, Oct. 2, 2019) (describing the similarity between optimal tax theory and other egalitarian theories of justice).

on what an "optimal" utilitarian income tax would look like.[43] However, there is broad agreement on several features.[44]

First, optimal tax theory typically prescribes a large cash "demogrant" (essentially, a universal basic income) of several thousand dollars, though the exact size is unclear,[45] to let people choose what to spend their money on. This demogrant goes by many names but receives support from some on the left and the right. For example, Milton Friedman long advocated for such a "negative income tax," essentially a universal basic income by a different name.[46] Most recently, a sophisticated estimation by economist Emmanuel Saez recommends a demogrant of $11,900 (in 2018 dollars).[47]

Second, the demogrant is taxed away at fairly high marginal tax rates for moderate income-earners (roughly those earning around median income). For example, Saez's model has 37% marginal tax rates on such incomes.[48] The reason is that lots of taxpayers earn *at least* modest amounts of income, so taxing this portion of the income of most taxpayers will raise a lot of money while distorting the behavior of relatively few taxpayers, since many taxpayers will earn well beyond that amount in any case.[49] Nevertheless, this creates a large disincentive to work for lower-income taxpayers—indeed, Saez estimates a resulting nonemployment rate of 13.8% because of the large demogrant and high taxes. The disincentive to work for lower-income earners is worth incurring because of the taxes collected on higher-income earners.

Third, optimal tax theory says that, as inequality increases, taxes should become more redistributive.[50] That is, as the share of income earned by those with the highest incomes goes up, their tax rates should go up.[51] This makes sense: as the rich get richer, their marginal utility of consumption declines yet more, making it worth taxing them more.

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[43] *See*, for example, the debate between Mankiw et al. on one side and Diamond and Saez on the other. Mankiw et al., *supra* note 15, at 155-59; Diamond & Saez, *supra* note 35, at 175-77.

[44] *Id.*

[45] Emmanuel Saez, *Optimal Income Transfer Programs: Intensive Versus Extensive Labor Supply Responses,* 117 Q.J. ECON. 1039, 1059-66 (2002).

[46] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962), http://circuloliberal.org/livros/capitalismo-e-liberdade.pdf; Robert Moffitt, *Welfare Work Requirements with Paternalistic Government Preferences*, 116 ECON. J. F441, F441 (2006).

[47] Saez, *supra* note 45, at 1060 tbl. 1 pnl. B (showing a guaranteed income of $7,300 in 1996 dollars). If anything, this demogrant estimate is small, given recent estimates. *See* Raj Chetty, *Bounds on Elasticities with Optimization Frictions: A Synthesis of Micro and Macro Evidence on Labor Supply*, 80 ECONOMETRICA 969, 1008 (2012) (showing that the average estimate of the extensive margin elasticity is 0.25, which would imply an even larger demogrant than the one described in the text above). *See also* Mankiw et al., *supra* note 15 (providing calibrations showing an even larger demogrant "equal to just over 60 percent of average income per worker in the economy"). Importantly, this analysis does not include "tagging," allowing larger transfers to those, like the disabled, who have lower earnings abilities; incorporating tagging would lower the size of the demogrant. Nor does it include the possibility of provision of services like healthcare, which would also presumably lower the size of the optimal demogrant. *See also* Batchelder, *supra* note 42 (describing how similar estimates have been around since the beginning of the Mirrlees model).

[48] Saez, *supra* note 45, at 1061.

[49] In technical terms, the best way to raise money from middle and high-income earners is to have high tax rates on their "inframarginal" earnings, the dollars that they earn that are far from their decision-making margin. For example, if a worker makes $40,000 per year and the government places high taxes on any earnings below $25,000, the worker is unlikely to cut back their hours in order to get under the $25,000 threshold.

[50] Mankiw et al., *supra* note 15, at 159-61; Diamond & Saez, *supra* note 35, at 189.

[51] SHEFFRIN, *supra* note 16, at 130-31.

Fourth, fixed attributes of people should be "tagged"[52] to observable characteristics correlated with earnings ability.[53] That is, for two taxpayers earning the same income, the one with the characteristics that are correlated with having the higher earnings potential, like height, should be taxed more.[54] While taxing income incentivizes people to work less, taxing based on *fixed* characteristics that are correlated with earnings ability still partially taxes those who can earn more but does not discourage work because fixed characteristics cannot be changed. In the extreme, if the government were omniscient, it could tax based on knowledge of an individual's earnings ability and not cause any distortion at all, since people would not be able to reduce their tax burden by changing their behavior.[55] Additionally, since the highly-skilled are so much more productive, they should pay high taxes, possibly so high that they need to work long hours in jobs that they dislike to provide more resources to be redistributed.[56] That is, since the costs of work are presumably similar for everyone but the benefits for society of work are so much higher for the high-skilled, the high-skilled should effectively be forced to work much more.

Fifth, at the top of the income distribution, taxes should roughly be set to maximize revenue from the rich. With a declining marginal utility of income, at very high incomes, marginal utility is essentially zero.[57] Thus, taxes should be set such that the government can collect as much as possible, setting a rate that discourages work somewhat, but not to the point of reducing tax revenue.

The result of this two-step is "one-pieism:" there is one economic pie to be maximized, and the goal of distributive government policy is to find the most "efficient" way to achieve a given distributive end. The goal is merely to produce an efficient legal rule while achieving a fair ex post distribution of dollars. Tax and nontax policies with the same distributive impact perfectly substitute for each other in solving the distributive problem because all that matters is the size of the slice of pie that each person has.

The view that nontax policies should not consider distribution has not gone uncontested. Outside of economics, many have criticized economics policy prescriptions.[58] Political scientists have proposed alternatives, such as "predistribution," that redistribute through the market, though without carefully offering an account of why it is superior to the economics prescription.[59] Inside economics, scholars have provided reasons why using taxes and transfers to compensate for legal rules that benefit the rich may be politically challenging—for example,

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[52] The idea originally comes from George A. Akerlof, *The Economics of "Tagging" as Applied to the Optimal Income Tax, Welfare Programs and Manpower Planning*, 68 AM. ECON. REV. 8 (1978).

[53] Mankiw et al., *supra* note 15, at 161-64; Diamond & Saez, *supra* note 35, at 166.

[54] N. Gregory Mankiw & Matthew Weinzierl, *The Optimal Taxation of Height: A Case Study of Utilitarian Income Redistribution*, 2 AM. ECON. J.: ECON. POL'Y 155 (2010).

[55] With advancements in genetics, an arguably dystopian future could be prescribed in which taxes are based not principally on earnings but instead on one's genetic endowment.

[56] *But see* Lily Batchelder, *supra* note 42, at 30-38 (arguing that the consequences need not be severe).

[57] Martin Feldstein, *The Mirrlees Review*, 50 J. ECON. LIT. 781, 783 (2012).

[58] *See, e.g.*, ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 9 (1996); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511 (2005).

[59] Jacob S. Hacker, *The Institutional Foundations of Middle Class Democracy*, POL'Y NETWORK (May 6, 2011), http://www.policy network.net/pno_detail.aspx?ID=3998&title=The+institutional+foundations+of+middle-class+democracy (coining the term); Ed Miliband, Leader of the Labour Party and Leader of the Opposition, Speech at the Stock Exchange (co-hosted by the Policy Network) (Sept. 6, 2012) (transcript available at http://www.politics.co.uk/comment-analysis/2012/09/06/ed-miliband-s-redistribution-speech-in-full) (using the term).

because of inertia, political capture, institutional failings, fairness norms, cognitive failures, or generally differing political action costs of redistribution through different means.[60]

But the critiques thus far have not carefully explored a core empirical flaw with the economics approach, which is that our political system does not act like one-pieism assumes because individuals fundamentally do not think that way. The Article rigorously considers the social reality of taxation at the crux of the law and economics arguments and then works out nontax policy implications. The next Section shows how such a view seems to conflict with commonly-held lay views. The Sections after that turn to policy implications.

II. THE THEORY OF SEPARATE PUBLIC ACCOUNTS

A. In General

Most people do not view policy like one-pieist economists do. Instead, they view policy through the lens of what this Article calls "separate public accounts." The theory of separate public accounts holds that, in contrast to the standard economic model, many ordinary people hold category-by-category views about what is just for a given policy without full fungibility across policies. As they consider policies, they have separate public accounts. Across policies, many ordinary people do not think like economistic benevolent dictators, trading off one policy against another to find the most efficient way to redistribute. Thus, distributive views can be different between taxation and other means of redistribution, as well as different between taxation and overall distribution. This subsection develops this theory about commonplace social and political psychology before turning to evidence on the area of interest for this Article: taxation.

This theory may simultaneously be obvious to many readers—which is good, as the argument is that this is commonplace psychology—and upend standard policy prescriptions. For example, people may think that it is good policy to spend on transportation to the poor, thus "redistributing" to them, so that they have the opportunity to get to work, rather than "giving out" cash transfers through the tax system. More to the point, people think about transportation and taxation at least partially separably, not part of one big fully fungible system. There could be many reasons for separate public accounts. At a high level, as the Article will discuss soon, the reason for such views does not matter for the policy response. Rather, the key point is that, given social reality, cash taxes and transfers cannot be expected to play the redistributionist role that they are supposed to play in standard economic analysis.

The explanation builds in part on behavioral economics work on "mental accounts." The example typically given for mental accounting is savings behavior.[61] Economics Nobel Laureate Richard Thaler describes the "key assumption" in standard economics of fungibility: people should treat a dollar the same way regardless of how they receive it.[62] But people do not act that way. For example, even though a dollar is basically the same whether it is earned through one's wages, appreciation in stock, a dividend, or one of many other means, people often have very different likelihoods of increasing consumption as wealth increases in the different "mental

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[60] *See* Fennell & McAdams, *supra* note 36, at 1056 (reviewing mechanisms); Markovits, *supra* note 58. *See also* STEARNS, ZYWICKI, MICELI, LAW AND ECONOMICS: PRIVATE AND PUBLIC 417-480 (2018) (describing the application of public choice theory to law and economics generally).
[61] Thaler, *supra* note 13.
[62] *Id*. at 194.

accounts." Thaler's explanation is that people adopt prudent rules-of-thumb in their financial decision-making. For example, believing that they should "live within your means," people consume out of their current wage income or dividends much more than out of increases in the value of their stock.[63]

The theory of separate public accounts holds that, in many ways, individuals view policy in the same way that they view their personal mental accounts: with ethical views that apply to each account. Economists tend to view welfare maximization as beginning with one big pie, containing taxes, environmental health, healthcare, education, transportation spending, minimum wage laws, etc., that can be distributed with perfect commensurability across policies as the social planner sees fit. This Article hypothesizes that many people, instead, view distributional issues on a category-by-category basis, like they view their personal finances. For example, people have policy views on taxes, which are often about not only proper incentives and redistribution but also about desert to pretax incomes.

This Article focuses on the tax public account. A description of the public accounts of all potential policies is beyond the scope of the Article. But to illustrate distributional views in a different public account, consider in-kind "necessities," for which there appears to be widespread support for provision more egalitarian than the efficient prescription. There are various indications of the public account for necessities. For one, our rhetoric surrounding necessities is often about rights. For example, in-kind rights "including food, clothing, housing and medical care" are delineated in the UN Declaration of Human Rights;[64] it does not say that people should get cash to spend as they wish. Even in the U.S. many seem to believe in a "right" to healthcare based on polls.[65] And across countries there is widespread in-kind redistribution in areas considered necessities, such as healthcare, education, housing, food, and childcare.[66] Some of that spending can be justified on standard efficiency grounds, such as high returns to education for children who cannot pay for it themselves.[67] But not all spending can be justified that way. For example, there is lots of redistribution through housing even to the elderly, who could presumably choose whether to spend cash on housing or other things absent a behavioral failing.[68] And the U.S. likely provides healthcare to people that costs far in excess of what poor people would be willing to pay for it.[69] This policy is so notwithstanding the traditional

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[63] *Id.* at 195.

[64] UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, ARTICLE 25 (1948).

[65] Larry Bye & Alyssa Ghirardeli, *American Health Values Survey*, ROBERT WOOD JOHNSON FOUND. 5 (2016), https://www.rwjf.org/content/dam/farm/reports/reports/2016/rwjf437263 (finding that an overwhelming majority of Americans believe that "[e]nsuring that low income Americans have the same chance to get good quality health care as those who are better off financially" should be a "top" or "high" priority); *Healthcare System*, GALLUP (last visited Jan. 30, 2020), https://news.gallup.com/poll/4708/healthcare-system.aspx (showing that since the beginning of the poll in the late 1990s, almost the entire period a majority has agreed that healthcare provision is a government responsibility).

[66] Currie & Gahvari, *supra* note 32, at 335-37 (describing the in-kind programs across countries).

[67] GRUBER, *supra* note 19.

[68] *Id*.

[69] Consider someone in her 50s who earns $20,000 per year. Based on average expenditures, healthcare costs about $8,000 to provide to this person. Bradley Sawyer & Gary Claxton, *How Do Health Expenditures Vary Across the Population?*, PETERSON-KAISER HEALTH SYSTEM TRACKER (Jan. 16, 2019), https://www.healthsystemtracker.org/chart-collection/health-expenditures-vary-across-population/#item-start; *2019 Health Insurance Plans and Prices*, HEALTHCARE.GOV (Accessed Sept. 18, 2019), https://www.healthcare.gov/see-plans/#/plan/results. It seems likely that someone so poor would prefer the cash to the full $8,000 in healthcare. For Medicaid beneficiaries ages 19-64, average annual spending per enrollee was $9,079 in 2010. David Lassman et al.,

efficiency analysis suggesting a possible Pareto improvement: everyone would be better off if people unwilling to pay for a full complement of healthcare instead received money through the tax system.

One could consider many other separate public accounts as well.[70] For example, people seem unwilling to tolerate valuing the lives of the rich more highly than the lives of the poor for the purpose of regulatory cost-benefit analysis—which would be required in any efficient regime, since the rich are "willing to pay" more for their lives owing to their greater ability to pay.[71] Other nontax public accounts may be indifferent to the needs of the poor. For example, in the context of torts for property damage, the goals may be primarily compensatory or deterring bad behavior, rather than considering distributional impacts between the rich and poor.[72] For now, though, it is at minimum arguable that people hold category-specific views. And just because a person gets more in one category does not mean that people think that the person should get less in another category: that's how economists think, but often not how non-experts think. These category-specific views about fairness have major implications for the right policy to adopt in a given real-world situation. Sections III and IV address those implications.

But why do people have these separate public accounts? In some sense, it should not be surprising. We have such imperfect fungibility in our everyday lives. For example, in our family lives, while there may be some trading off between partners ("you do the cleaning, I'll pick up the kids"), there are limits ("if you do all the childcare, you can spend more money on videogames"). A key point of this Article is that, for the most part, the reason does not matter on the question of whether nontax polices should consider equity. Of course, it matters for the kind of *tax policy* that one would ideally want to adopt. This kind of debate about the relation between moral intuitions and ideal policy is a common one—for example, in torts.[73] The question here is different: what is the impact of views about tax policy on the *nontax policy* that we should adopt. For that, the reasoning matters less, as the next Section discusses.

US Health Spending Trends by Age and Gender: Selected Years 2002–10, 33 HEALTH AFF. 815, 820 exhibit 4 (May 2014).

[70] *See*, *e.g.*, Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526 (2004) (arguing for the centrality of non-standard preferences for process, not just products, in the context of consumer choice).

[71] *Income Elasticity and Income Growth Estimates: Technical Memorandum* (Environmental Protection Agency, Feb 5, 2016), archived at http://perma.cc/BW2Q-PFEZ (showing that willingness to pay to avoid mortality increases by between 70 percent and 110 percent in response to income doubling). Despite the clear efficiency-based logic to value the lives of the rich more, federal agencies never do, apparently due to political opposition. *See* U.S. Dep't of Transp., Revised Departmental Guidance 2016: Treatment of the Value of Preventing Fatalities and Injuries in Preparing Economic Analyses 1, 3 (2016), https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf (saying that lives are not valued differently "for policy reasons"). *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1994) (requiring cost-benefit analysis based on efficiency in federal agencies); *see also* MICHAEL A. LIVERMORE & RICHARD L. REVESZ, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 83-84 (2008) (arguing that "a cost-benefit analysis using an average value of a statistical life is unmoored from its economic justification").

[72] JAMES A. HENDERSON JR., RICHARD N. PEARSON, & DOUGLAS A. KYSAR, THE TORTS PROCESS 35-39 (8th ed., 2012) (describing how major theories of tort law, including instrumental, corrective justice, and civil recourse, do not focus on redistribution from the rich to the poor for its own sake).

[73] Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX L. REV. 1801 (1996-1997). *See generally* Judith Jarvis Thomson, *The Trolley Problem,* 94 YALE L. J, 1395, 1409 (1985) (describing conflicting moral intuitions about sacrificing one person to save five, depending upon how the one is sacrificed).

The first explanation is simply that the views are normatively right, either deontologically or as social preferences deserving normative weight. Thomas Scanlon describes how, when making moral judgments about government policy, "it seems clear that the criteria of well-being that we actually employ . . . are objective" rather than based totally upon the subjective views of individuals, as in the optimal tax model.[74] And, in particular, people commonly consider the "urgency" of the desire, such that, for example, "health is more important than amusement," making government support for healthcare more justified than support for amusement.[75] By this view, in the words of Michael Walzer, different goods are in different "spheres of justice," each with its own notion of the proper role of the state in adjudicating distributive issues.[76]

The second—and most standard within conventional economics—is that people are biased or confused. By this view, building on the economics work on mental accounts, people mistakenly fail to account for tradeoffs among policies. Even in personal financial decision-making, with huge individual stakes, people tend to think in these terms. So perhaps it is unsurprising that in their thinking about policy issues, where the personal stakes of one's actions like voting are trivial by comparison, they would similarly develop rules of thumb policy by policy. Just as it could be efficient for individuals to respond the same way to a one-dollar increase in stock holdings as to a one-dollar increase in take-home salary, it may be efficient for government to redistribute a dollar by looking across a million policy combinations and using the policies that best maximize aggregate welfare. But those are really hard optimization problems, even for experts who spend their whole lives on the task[77]—and yet more so for laypeople. A resort to policy-specific rules of thumb about fairness—like desert for taxation—seems a reasonable response to the vast epistemic and analytical uncertainties.

A third reason that people may have separate public accounts is difficulty monitoring politicians, whom voters do not fully trust.[78] People's lived experiences may have a positive correlation to the broader reality on this matter[79]—for example, people may observe how little

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[74] Thomas M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 658 (1975). For a related normative account, *see also* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42 (Erin I. Kelly ed., 2001) (arguing for the provision of "primary goods" like health care "to meet the needs and requirements of citizens as free and equal").

[75] Scanlon, *supra* note 74, at 660.

[76] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 7-11 (1984).

[77] *See*, for example, the long debate about whether government intervention in the economy tends to be efficient. *Compare* David Warsh, *The Fourth Generation in Chicago*, ECON. PRINCIPALS (Nov. 16, 2014), http://www.economicprincipals.com/issues/2014.11.16/1664.html ("Becker, never averse to speaking plainly about the Chicago perspective, often used to put it this way: free markets do a good job.") *with* Economists for Inclusive Prosperity, www.econfip.org (economics arguing that, in light of failures of competition, behavioral failures, and other market failures like information asymmetries, government "intervention" often is efficient).

[78] There are two components to monitoring: information-gathering about each policy and use of that information to compare policy platforms. Citizens neither gather an equal amount of information about every policy nor consider each policy dimension of a platform when comparing platforms. People are more likely to access information for issues that they care about. Shanto Iyengar et al., *Selective Exposure to Campaign Communication: The Role of Anticipated Agreement and Issue Public Membership,* 70 J. POL. 186 (2008). And when facing a difficult decision among party platforms, citizens often use "noncompensatory" strategies, "where either some alternatives are given little consideration or some attributes are more or less ignored," and therefore ignore many relevant between-policy tradeoffs. RICHARD R. LAU & DAVID P. REDLAWSK. HOW VOTERS DECIDE: INFORMATION PROCESSING IN ELECTION CAMPAIGNS, 257 (2006).

[79] *See generally* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (Ronald Hamowy ed., 2011) (analyzing local and tacit knowledge); *see also* Fuat Oguz, *Hayek on Tacit Knowledge*, 6 J. INST. ECON. 145, 159 (2010) (summarizing Hayek's work on tacit knowledge).

the distributional consequences of trade deals have been offset.[80] So, people may use proxies, like fairness within each policy, to evaluate how fair policy is overall even at the cost of losing out on between-policy tradeoffs.

Even Louis Kaplow and Steven Shavell, the most articulate and clear-headed proponents of what this Article calls one-pieism, acknowledge that policy-by-policy social norms of fairness may be important, rooting them in adaptive norms of fairness that evolved in small-group settings.[81] Such norms play a useful role in promoting cooperation in everyday behavior. They argue that such norms should not have independent weight in evaluating social policy, as such norms developed by the evolution of hunter-gatherers may often be irrelevant for policymaking in modern states.[82] But even they acknowledge their existence. This Article makes no claims about their normative weight, but only says that they are important social phenomena.

B. Taxation Should Reflect Desert in Pretax Income

In the standard model, essentially only three things matter for setting taxes prescriptively and descriptively: raising revenue, maintaining incentives to work, and achieving just post-tax outcomes. However, in the taxation public account, many people care about desert in taxation based on pretax income. That is, if people more earn money, even because of innate skill, they deserve to keep a decent share of it, and, if they earn less, they deserve less money, all for reasons unrelated to incentives to work. This commonplace view is inconsistent with the standard economic model, and the standard model's prescriptions are deeply undermined by the presence of these desert-based views. Importantly, with partially compartmentalized policy views, it is completely consistent to be resistant to redistribution through the *specific process* of taxes, while at the same time supporting either more equal outcomes overall or more egalitarian provisions through specific goods (like healthcare) or processes (like regulatory cost-benefit analysis).

In short, the standard narrative is: *In setting cash transfers to the poor, Congress redistributes in line with the low social value of redistribution, which is the same for all means of redistribution.*

In contrast, the separate public accounts narrative is: *In setting cash transfers to the poor, Congress redistributes in line with what voters consider to be the social value of redistribution <u>through cash transfers specifically</u>. Voters have a specific distaste for "giving out cash." At the same time, greater economic equality remains good.*

There are several reasons to think that notions of desert in pretax income that limit tax-based redistribution are important parts of how people think. The first is philosophical reflection and introspection. The second is evidence from survey experiments. The third is our political rhetoric. The final reason is the large gulf between the real world and the standard economics prescriptions for taxation.

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[80] David H. Autor et. al., *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2151 (examining the distributional effects of import competition from China and finding that "rising transfer income offsets only a small part of the decline in household earnings"); Nathan Nunn, Nancy Qian & Jaya Wen, *Distrust and Political Turnover*, at 36 tbl. 2 (NBER Working Paper No. 24187, 2018), https://www.nber.org/papers/w24187.pdf (finding a significant, negative correlation between generalized "trust" among citizens and "trade openness" in a study about the influence of trust on whether economic recessions force political turnover in democracies).

[81] KAPLOW & SHAVELL, *supra* note 7, at 69-81.

[82] *Id.* at 70.

Turning first to philosophical reflection and introspection, the seminal statement on tax desert is Liam Murphy and Thomas Nagel's *The Myth of Ownership: Taxes and Justice*, in which they argue that it is a myth that an individual could be an "owner" of her pretax income, since that pretax income is determined by legal structures for which she has little direct responsibility. They nevertheless describe the "enormous appeal" of what they call "everyday libertarianism" in taxation.[83] They root the commonplace view in two ideas: property rights to pretax income and "desert in market rewards." By the term "everyday libertarianism," they mean not the literal Nozickian libertarian idea that people have an absolute property right to their pretax income, but rather that fully "banishing [the ideas of property rights in pretax income and "desert in market rewards"] from our everyday thinking" is difficult.[84] They note that "people . . . intuitively feel that they are in an absolute sense morally entitled to their net incomes," generating a sense of property rights to those incomes that hinder progressive taxation.[85] And "the unreflective ideas that we may have unqualified moral entitlement to what we earn in the market and that higher market returns are in some sense deserved as a reward arise naturally within the everyday outlook of participants in a capitalist economy."[86] It is commonplace to think that people deserve to be rewarded for hard work and thrift, and the market does, to some extent, reward those virtues with higher incomes. However, "[t]he natural idea that people deserve to be rewarded for thrift and industry slides into the much broader notion that all of pretax income can be regarded as a reward for those virtues."[87]

Notwithstanding their insistence that everyday libertarianism is not just morally wrong but illogical, Murphy and Nagel acknowledge that a change in mindset would require a "shift to a purely conventional conception of property," which they "acknowledge [is] counterintuitive," as "[t]axes are naturally perceived by most people as expropriations of their property."[88] Put differently,

> We recognize that it is a lot to hope that this philosophical point [that property is conventional] should become psychologically real to most people. Pretax economic transactions are so salient in our lives that the governmental framework that determines their consequences and gives them real meaning recedes into the background of consciousness. What is left is the robust and compelling fantasy that we earn our income and the government takes some of it away from us, or in some cases supplements it with what it has taken from others.[89]

They suggest that "[c]hanging this habit of thought would require a kind of gestalt shift, and it may be unrealistic to hope that such a shift in perception could easily become widespread."[90] The claim is not that taxation is impossible but that everyday libertarian views lead to a drag on the ability of the state to redistribute through taxes.

The normative starting point of Murphy and Nagel is perfectly consistent with optimal tax theory, and the commonplace "everyday libertarianism" that they describe is not consistent with it. Optimal tax theory imagines all resources combined into one pie and then reallocated to maximize welfare based on ultimate outcomes. It does not matter who has what to begin with. Of

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[83] LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 34 (2002).
[84] *Id.*
[85] *Id.* at 35.
[86] *Id.* at 36.
[87] *Id.* at 36.
[88] *Id.* at 175.
[89] *Id.* at 176.
[90] *Id.* at 175.

course, allowing people to keep part of their income is important to encourage work. But desert-based views are saying something different. With such views, pretax income generates desert, so that more unequal pretax income will tend to increase the desired inequality in post-tax incomes, even ignoring incentives. In contrast, for the optimal tax theory used in law and economics, each individual's income is just used to achieve the ultimate social income; there are no rights and there is no desert based on pretax income. Individuals are completely dissolved in optimal tax theory, except as producers of income facing incentives and then as consumers of income, untied to who produced what.

Second, emerging empirical evidence in psychology and economics suggests that ordinary people do not think about taxation the way that standard economics says that they do. Recent evidence from Matthew Weinzierl, Steve Sheffrin,[91] and others reinforces the view that a lot of people don't view taxes in exclusively welfarist terms. Based on an extensive reading of the literature on taxation and original research on redistributive views, Sheffrin writes in *Tax Fairness and Folk Justice*,

> [o]ne clue to ordinary ideas of justice is that in their day-to-day lives, individuals [are] often much more concerned about *process and procedure* than they are about *purely distributional issues*, or "who gets what." Expert theories of justice inevitably focus on distribution. Folk justice may include distributional concerns, but also includes procedural concerns.[92]

Sheffrin argues that "equity theory"[93] in psychology may be helpful in understanding part of the typical American's views around taxation. The theory holds that "fair" outcomes are characterized by a rough proportionality between input and output.[94] In the case of taxes, that means a rough proportionality between the amount one pays in taxes and the benefits one receives from the government. Again *desert matters*: people have some entitlement to the money that they earn, and those who do not earn lack some entitlement.

While there have now been several survey experiments on the topic,[95] this Article focuses on two illustrative ones. The first shows evidence consistent with equity theory. While, in the abstract, people do not seem to think that others should be rewarded for genetic advantages, in real-world circumstances, they do.[96] Christoper Freiman and Shaun Nichols present respondents with a case of two jazz singers, each of whom works equally hard, but one of whom is a better singer because of genetic differences. Respondents said that the better singer deserved more money and that it was fair for her to receive it. This empirical result conflicts with the prescription from optimal tax theory that both singers receive the same post-tax income, apart from incentives—which are not at play here because these skills are inborn.[97] This evidence suggests that instead even pretax income arising from inborn skills generates desert.

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[91] SHEFFRIN, *supra* note 16.
[92] *Id.* at 3.
[93] *Id.* at 35.
[94] ELAINE WALSTER ET AL., EQUITY: THEORY AND RESEARCH 10 (1978).
[95] *See, e.g.*, SHEFFRIN, *supra* note 16 (assembling sources); Alberto Alesina et al., *Intergenerational Mobility and Preferences for Redistribution*, 108 AM. ECON. REV 521 (2018); Jimmy Charite et al., *Reference Points and Redistributive Preferences: Experiment Evidence* (Nat'l Bureau of Econ. Research, Working Paper No. 21009, 2019); Raymond Fisman et al., *Do Americans Want to Tax Capital? Evidence from Online Surveys*, (Nat'l Bureau of Econ. Research, Working Paper No. 23907, 2017); Matthew C. Weinzierl, *A Welfarist Role for Nonwelfarist Rules: An Example with Envy* (Harv. Bus. Sch., Working Paper No. 17-021, 2017).
[96] Christopher Freiman & Shaun Nichols, *Is Desert in the Details?*, 82 PHIL. & PHENOMENOLOGICAL RES. 121 (2011).
[97] Gregory Mankiw, *Defending the One Percent*, 27 J. ECON. PERSP. 21, 29 (2013).

In the second experiment, Weinzierl developed a compelling survey that further shows the importance of desert based in pretax income for reasons not related to effort.[98] He gives survey respondents a hypothetical in which two people have different pretax incomes, one richer and one poorer. But the parties only get these incomes if they agree to jointly pay a given amount for a public good. This setup removes incentive effects of taxation, since the parties are just given the money irrespective of behavior. Respondents are then asked how a tax and subsidy burden should be divided between the two individuals.[99] A typical social welfare function prescribes equalizing the incomes of the two people, because of the declining marginal utility of income. However, a large majority of respondents—75%—stop short of full equalization, and many stop well short of equalization.[100] Put differently, the entirely arbitrary "pretax income" appeared to have moral weight. Pretax incomes appear to generate desert.

Nothing in the experiment suggests that people are not also motivated in part by standard utilitarian concerns; there is some redistribution. Nevertheless, this evidence suggests that people have some views quite distinct from the utilitarian redistributionist ones that economists typically focus on. Pretax income—even if entirely arbitrary, like natural ability over which people have no control—appears to drive many people's views of fair taxation.

The third reason to think that many people believe that desert inheres in pretax income is that our political discourse reflects such concerns. For example, President George W. Bush often described tax cuts as letting Americans "keep more of their hard-earned dollars," an apparent appeal to hard work generating desert.[101] While Bush mentioned incentives too, the issue of distributive justice—setting tax rates based on need, a key factor in optimal taxation—was often entirely absent. Today's liberal crop of Democratic presidential candidates seems to at least partially agree: with the exception of Andrew Yang (who polls in the low single digits),[102] even the most liberal candidates do not propose providing large unrestricted cash transfers to the poor. And Democrats commonly use similar language about desert.[103]

And, fourth, existing institutions provide additional evidence of the dissonance between the standard economic story with optimal taxes and commonplace views about taxation, assuming that the real-world evolution of political institutions reflects those commitments to some extent.

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[98] Weinzierl, *supra* note 16.

[99] The interface clearly showed how much money each party ended up with given a proposed allocation, making outcomes salient. *Id.* at 58.

[100] *Id.* at 56.

[101] President George W. Bush, President's Weekly Radio Address, (Apr. 15, 2006) https://georgewbush-whitehouse.archives.gov/news/releases/2006/04/text/20060415.html.

[102] *2020 Democratic Presidential Nomination*, REAL CLEAR POLITICS, https://www.realclearpolitics.com/epolls/2020/president/us/2020_democratic_presidential_nomination-6730.html (Accessed September 16, 2019) (showing no poll higher than 5% between April and early September of 2019).

[103] For example, in response to the question, "Does anyone deserve to have $1 billion?" Senator Kamala Harris responded, "If they earn it and work hard for it, sure." Alexander Burns et al., *Meet the Candidates: Does Anyone Deserve to Have a Billion Dollars?*, N.Y. TIMES (2019), https://www.nytimes.com/interactive/2019/us/politics/billionaires-democratic-candidates.html. President Barack Obama said, "Understand we've never begrudged success in America. We aspire to it. We admire folks who start new businesses, create jobs, and invent the products that enrich our lives. And we expect them to be rewarded handsomely for it." *President Obama on Inequality (transcript)*, POLITICO (Dec. 4, 2013), https://www.politico.com/story/2013/12/obama-income-inequality-100662. *See also* DANIEL MARKOVITS, THE MERITOCRACY TRAP (2019) (arguing that an ethos of "meritocracy" pervades our age, including the idea that, because success is meritocratic, the earnings from career success are thus deserved).

Recall the typical implications of optimal tax theory, the taxes needed to justify the prescription of ignoring equity outside of taxation. The first two implications of optimal tax theory are that there should be a large universal demogrant that is then taxed away at fairly high marginal tax rates for those at modest incomes. Without denying that some policies give some cash to some people, the government provides no such demogrant or anything close to it.[104] For example, a childless adult who is not working or in training may be eligible for little or no cash support from the government.[105] This outcome is consistent with the importance of desert and a resulting distaste for unrestricted cash transfers: the state typically does not give out money to those who do not work for it, without some strings attached.[106] And to those who do work at modest incomes, it would be unfair to have high tax rates because they would not be getting a fair share of output of their labor. Indeed, as suggested above, those high tax rates would discourage large numbers of people from working at all, eliminating their workplace contribution to the state altogether.

The third prediction of optimal tax theory is that, as inequality goes up, taxes become more redistributive. Yet, despite the well-documented rise in income inequality,[107] there is

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[104] Probably the closest in United States is the Alaska Permanent Fund, which used revenue from oil drilling to fund a "dividend" that averaged $1,300 per resident per year between 2009 and 2018. *See* Alaska Dep't of Revenue, Perm. Fund Dividend Div., *Summary of Dividend Applications & Payments* (2016), https://pfd.alaska.gov/Division-Info/Summary-of-Applications-and-Payments. Whether something similar would be feasible in the rest of the country without significant oil wealth is an open question. The U.S. Internal Revenue Code does not provide transfers at all to those who do not work, even those with children. For those who earn no money, none of the (per child) $2,000 Child Tax Credit is available. I.R.C. § 24(d)(1)(B). Nor is the Earned Income Tax Credit available, as that also requires earned income. I.R.C. § 32. Temporary Assistance for Needy Families benefits have work requirements and typically have time limits. *See* Center on Budget and Policy Priorities, *Policy Basics: An Introduction to TANF* (2018), https://www.cbpp.org/research/family-income-support/policy-basics-an-introduction-to-tanf. Probably the closest federal program to a cash transfer is Supplemental Nutrition Assistance Program benefits, with a maximum benefit of $353 per month of food for a single parent with a child. But, for adults without children, benefits are typically limited to three months over three years, unless beneficiaries are working or training. *See* Center on Budget and Policy Priorities, *A Quick Guide to SNAP Eligibility and Benefits* (2019), https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits.

[105] *Id.*

[106] An interesting question is what other countries do, as that may suggest what is possible in the U.S. Some Gulf States have an "implicit government job guarantee" for nationals, but that is different from a demogrant because it involves work. Steffen Hertog, *The GCC's National Employment Challenge*, WASH. POST (July 31, 2014). As well, some Scandinavian countries have generous unemployment programs. For example, unemployment insurance in Denmark allows beneficiaries to receive up to 90% of their previous salary. However, receipt of unemployment benefits requires previous work experience (with exceptions for those who have just finished education or training) and active job searching, and a person is only entitled to benefits for 2 years within a 3-year period. *Denmark–Unemployment Benefit*, EUR. COMMISSION: EMP., SOC. AFFAIRS & INCLUSION, http://ec.europa.eu/social/main.jsp?catId=1107&langId=en&intPageId=4496. Again, this policy is not a demogrant because it is tied to work. Finally, the UK passed a small Child Trust Fund, in which children were given £500 from the government and the opportunity for parents and grandparents to save additional money tax-free, but these are far smaller than the sum of annual demogrants and in any case only go to children. *See* Child Trust Funds Act 2004, c. 6 (U.K.); Zoe Williams, *Why We Cannot Afford to Raid the Child Trust Fund Piggy Bank*, GUARDIAN (May 2, 2010); *see also Child Trust Fund Statistics: Detailed Distributional Analysis*, HM REVENUE & CUSTOMS tbl.2 (Feb. 2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/255881/dda.pdf.

[107] Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913 – 1998*, 118 Q.J. ECON. 1 (2003). The extent of the rise is disputed. *E.g.* Richard Burkhauser et al., *Recent Trends in Top Income Shares in the United States: Reconciling Estimates from March CPS and IRS Tax Return Data*, 94 REV. ECON. & STAT. 371 (2012); Alan J. Auerbach et al., *U.S. Inequality, Fiscal Progressivity, and Work Disincentives: An Intragenerational Accounting* (Nat'l Bureau of Econ. Research, Working Paper No. 22032, 2016).

widespread agreement that taxes have not kept up, though there is disagreement on the magnitude.[108] A striking piece of evidence consists of the relatively low support for high taxes on the rich: recent surveys show only roughly half of Americans want high taxes on the rich.[109] The large numbers of relatively poor people who do not want higher taxes on the rich is especially striking, with 26% earning less than $25,000 opposing higher taxes on the rich and an additional 17% neutral.[110] This result is also consistent with the importance of desert: people get what they deserve. And, if inequality goes up, that does not necessarily mean that the rich should pay much more because their skill and work effort produce pretax income that people deserve to keep a large share.[111]

A fourth implication of optimal tax theory is that features correlated with higher earnings, like height, should be "tagged" and thus taxed. In practice, though we do see some tags like disability, we do not see taxation based on tags like height.[112] Nor does a tax based on height seem like a plausible thing to do. Taxing differently two different-height people who earn the same income may simply seem unfair. Evidence from survey experiments confirms that very few people support such tags.[113] This result is also consistent with an aversion to setting taxes on the basis only of incentives and redistribution, rather than also internal norms like desert. If two people produce the same amount, they should be treated the same by the state, even if one is tall and one is short.

The fifth implication is revenue-maximizing tax rates at the top of the income distribution, such that rich individuals are treated "only as the revenue producing property of the state."[114] We do not see such tax rates, perhaps because (absent a war or some perceived great social need[115]) well-off individuals—as individuals who have large talents and work hard—deserve to keep a decent share of their income.

Recent advances allow economists to quantify and summarize the redistributive views implicit in the tax code, by backing out how much we must value income in the hands of the poor to be willing to distort behavior with taxes and transfers to help them.[116] Nathaniel Hendren shows that our current tax code implicitly values a dollar in the hands of someone at the 10th

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[108] *See, e.g.,* Benjamin B. Lockwood & Matthew Weinzierl, *Positive and Normative Judgments Implicit in US Tax Policy, and the Costs of Unequal Growth and Recessions*, 77 J. MONETARY ECON. 30 (2016) (showing that the implicit welfare weight on the poor versus the rich has declined considerably over the past few decades).

[109] Karlyn Bowman & Andrew Rugg, *Public Opinion on Taxes: 1937 to Today,* AM. ENTERPRISE INST. 25 (Apr. 2012), http://www.aei.org/wp-content/uploads/2012/04/-aei-public-opinion-study-on-taxes-2012_082833686158.pdf; SHEFFRIN, *supra* note 16, at 119-20.

[110] Rebecca Reed-Arthurs & Steve Sheffrin, *Windows into Public Attitudes Towards Redistribution*, 102 PROC. OF THE NAT'L TAX ASS'N 165 (2009).

[111] *See* MARKOVITS, *supra* note 103.

[112] Mankiw et al., *supra* note 15.

[113] Emmanuel Saez & Stefanie Stantcheva, *Generalized Social Marginal Welfare Weights for Optimal Tax Theory*, 106 AM. ECON. REV. 24 App. 14-20 (2016) (presenting survey evidence suggesting that virtually no one supports tagging in their context).

[114] Feldstein, *supra* note 57, at 783.

[115] KENNETH SCHEVE & DAVID STASAVAGE, TAXING THE RICH: A HISTORY OF FISCAL FAIRNESS IN THE UNITED STATES AND EUROPE (2016) (making this argument).

[116] The method first considers the incentive effects of taxation: if people's incomes are taxed, they will tend to work less. And then it asks how much people implicitly weight, or value, a dollar in the hands of a rich versus poor person, given those incentive effects and the taxes that we see. So, the more redistribution there is to the poor, despite the efficiency harms of doing so, the larger the implicit weight on the poor relative to the rich. Nathaniel Hendren, *Efficient Welfare Weights* (draft, March 2019); Lockwood & Weinzierl, *supra* note 108.

percentile of income ($14,000) 1.5 times as much as someone at the 90th percentile of income ($179,000).[117]

By contrast, individuals' own personal behavior regarding risk implies a far higher weight on the poor relative to the rich.[118] For themselves, they value an extra dollar about *thirteen*[119] times more highly if they had an income at the 10th percentile than if they had an income at the 90th percentile.[120] The reason is that people value the things (often necessities) they would buy at low incomes more than the things (often luxuries) they would buy at high incomes. The results come from looking at, for example, how much people are willing to pay for insurance, which essentially redistributes money to times when the individual is poorer because of loss of an asset like a house burning down.

So our current tax code redistributes across people nowhere remotely close to the amount that individuals do internally for themselves, given the implicit ratio of values between the 10th and 90th percentile income-earners of 1.5 in the tax code versus 13 internal to individuals. Thus, the tax code implicitly only gives poor individuals 12% of the weight implied by people's own behavior. Of course, there are major issues of interpersonal comparability in going from within-person to between-person comparisons. And by no means does this method necessarily produce the normatively right distribution of resources. Nevertheless, this vast divergence from a common economics baseline is suggestive.

Inferring commonplace views from existing policies while trying to offer recommendations to improve policy leads to an obvious circularity problem.[121] Policies could look the way they do for many reasons, including political capture.[122] Nevertheless, the difference between what taxes would probably need to do under optimal tax theory and what they in fact do is remarkably gaping. This is especially so because there are no technological barriers to any of the implications of optimal taxes: a demogrant, high marginal tax rates for low-income earners, or taxation based on tags. We have just chosen not to do those things. And, in any case, as the previous subsection explained, another account would need to explain the great deal of redistribution through nontax means. Maybe asking the tax code to provide the

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[117] Hendren, *supra* note 116, at 24 (Fig. 6).

[118] These results are conservatively, and roughly, approximated by the "logarithm" function.

[119] For incomes, *see Average, Median, Top 1%, and Income Percentiles in 2018 in the United States*, DQYDJ.COM, https://dqydj.com/united-states-household-income-brackets-percentiles/ (last visited Sept. 24, 2019).

[120] *See e.g.,* Raj Chetty, *A New Method of Estimating Risk Aversion*, 96 AM. EC. REV. 1821 (2006) (finding a "coefficient of relative risk aversion" of approximately one, which has this implication). The "logarithmic" utility function implied by this analysis is also suggested by cross-country studies measuring stated happiness. Nestor Gandelman & Rubén Hernández-Murillo, *Risk Aversion at the Country Level,* 97 FED. RES. BANK ST. LOUIS REV. 53 (2015). Note that, as Chetty at 1821 points out, many other estimates imply even higher risk aversion, which suggest an even larger divergence in distributional weights between the rich and the poor.

[121] *See, e.g.*, RAYMOND GUESS, PHILOSOPHY AND REAL POLITICS 49-50 (2008) (describing how conceptual instruments used to analyze social reality are often inextricable from social reality itself: "Often, you can't see the original problem clearly until you have the conceptual instrument, but having the instrument can then change the 'real' situation with which one is confronted so that other, unforeseen problems emerge.").

[122] *See, e.g.*, Philip Bump, *Who Actually Wants Congressional Republicans to Pass Trump's Tax Bill?*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/02/who-actually-wants-congressional-republicans-to-pass-trumps-tax-bill/; Marissa Schultz, *GOP's Big Donors Threaten to Close Wallets if Tax Reform Isn't Passed*, N.Y. POST (Nov. 6, 2017), https://nypost.com/2017/11/06/gops-big-donors-threaten-to-close-wallets-if-tax-reform-isnt-passed/; Dylan Scott, *House Republican: My Donors Told Me to Pass the Tax Bill or "Don't Ever Call Me Again"*, VOX (Nov. 7, 2017), https://www.vox.com/policy-and-politics/2017/11/7/16618038/house-republicans-tax-bill-donors-chris-collins.

redistribution necessary for a just society is simply asking ordinary people to accept something inconsistent with their moral intuitions.

In short, one of the two implications for the law and economics two-step is imposing an "optimal" tax. Yet people appear to hold views at odds with the implications of optimal taxation, and current policy is far off from those implications. Later Sections discuss potential policy implications of this dissonance. Scholars disagree about whether desert *should* inhere in pretax income.[123] But there is broad agreement that these views are commonplace, which is the only claim this Article makes. For those who are formally inclined, the Appendix presents a model, showing that the normative status of desert in tax does not matter for good *nontax* policy. The reason is simply that, whether or not it is good to redistribute a lot through cash taxes and transfers, so long as the social fact is that such redistribution is and will be insufficient to address demands for equality, we will need to look elsewhere to achieve equality goals. What has been missed in the debate thus far—which has focused on the implications of these views *for taxation*—is the implication of the apparently durable[124] commonplace views for vast array of *nontax policies*, given that tax policy is set by Congresspeople who are at least partly (if imperfectly[125]) answerable to voters.

Overall then, the Article operates from a theory about the social and political psychology of voters: Many have, in significant part, desert-based views about taxes, so that the well-off deserve to keep part of their earnings, and the poor deserve less unless they work for it. This thinking directly contradicts the logic underlying optimal tax theory and, in turn, the efficiency-minded stance of law and economics. They think this way because they have separate public accounts for taxation and other policies, each with its own distributive views. As a result, there is imperfect fungibility across the accounts. And distributive views about taxation—just one of many policies—do not necessarily reflect distributive views about other means or about distribution overall.

The key takeaway if Congressional policymaking to a significant extent reflects these views is that there will not be enough redistribution through taxes, economists' chosen tool. People have an aversion to both redistributive taxation and inequality. Under the standard economic logic, these should be the same thing because taxes should do the work of redistribution—but that is not so with separate public accounts.

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[123] *See* Mankiw, *supra* note 97, at 32 (arguing for a "just deserts" goal on taxation, in which "people should receive compensation congruent with their contributions"); MURPHY & NAGEL *supra* note 83 (arguing the opposite). *See also* SHEFFRIN, *supra* note 16, at 8-9 (describing "consonance" with existing policies).

[124] Of course, policy views can change rapidly. As the Article discusses below, this factor should be considered, including by changing policies if those views do change. Desert inhering in pretax income, though, seems like a durable feature of the U.S., and likely will continue into the future.

[125] Of course, the relationship between voters' policy views and actual policymaking is unclear. For example, some argue that the policy preferences of none but the richest drive policy. *See generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE (2014) (showing that, controlling for the views of the well-off, the views of the poor show no relationship with actual policy). Nevertheless, it seems reasonable to argue that widespread voters' views—especially among the well-off, who are likely most inclined to value desert—have an important impact on those that they elect. *See* SHEFFRIN, *supra* note 16, at 125-28 (finding those with incomes greater than $200,000 generally oppose using the tax system to redistribute, while those making less $25,000 strongly support doing so, and assembling other evidence); Alberto F. Alesina & Paola Giuliano, *Preferences for Redistribution*, 1, 27-35 (NBER Working Paper No. 14825, 2009), https://www.nber.org/papers/w14825.pdf (finding income is negatively correlated with preferences for redistribution).

C. Alternative Explanations

One might be concerned that mechanisms other than desert inhering in pretax income explain the observed lack of redistribution through taxation. Nothing here implies that this is the only mechanism, just that it is important. Nevertheless, it is worth explaining why other potential explanations are incomplete.

One alternative explanation is simply capture of the political system by powerful, moneyed interests.[126] On that account, we do not have enough redistribution through taxes because powerful, moneyed interests stop it. This could easily be an important explanation operating alongside the separate public accounts explanation. But it is probably not the full story. One reason is that we do see egalitarian policymaking and rhetoric outside of taxes on earned income.[127] As described earlier, people care a great deal about access to necessities. Even Republican politicians talk about universal access to healthcare, for example.[128] And we see concerns with inequality in a host of other places as well, such as valuing the lives of rich and poor equally in regulatory cost-benefit analysis. Rather, acknowledging that we need to know more, it seems like there is something particular about redistributing with cash taxation based on earned income.

Another potential explanation is that people just do not care much about economic inequality. But, polls consistently show the opposite.[129] So does our politicians' rhetoric—such as that for both parties decrying inequality, a rigged system.[130] And so do all the egalitarian attitudes that were just listed—such as the right to healthcare declared across party lines.[131]

A third possibility is the one often given about there being an institutional failure in which, if institution A makes a policy change with distributional consequences, institution B may not make up for it. Or, even if institution A could make up for it, it won't because of inertia. In law and economics, it is typical to frame the issue as being one of needing taxes and transfers to "compensate" for distributional changes.[132] However, such thinking sometimes reflects a basic confusion: compensation for efficient policies that harm the poor is neither necessary nor sufficient to maximize welfare. Suppose that every single efficient nontax policy that harms the

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[126] GILENS, *supra* note 125; NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA (2017).

[127] For this paragraph, *see supra* notes 65-69 and surrounding text.

[128] Robert Pear & Thomas Kaplan, *G.O.P. Plans to Replace Health Care Law With 'Universal Access',* N.Y. TIMES (Dec. 15, 2016) (describing House Republicans' plan of achieving "universal access" to quality, affordable healthcare).

[129] *See, e.g.*, PEW RESEARCH CENTER, *supra* note 1.

[130] *See, e.g.*, Rampell, *supra* note 2.

[131] *See* Pear & Kaplan, *supra* note 128; Bye & Ghirardeli, *supra* note 65.

[132] *See, e.g.*, Antonia Cornwell & John Creedy, *Measuring the Welfare Effects of Tax Changes Using the LES: An Application to a Carbon Tax*, 22 EMPIRICAL ECON. 589, 589 (1997) (considering "transfer payments to compensate for adverse distributional effects of a carbon tax"); Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCANDANAVIAN J. ECON. 264, 281 (1979) (using the tax system to compensate for distributional impacts); David A. Weisbach, *Distributionally Weighted Cost–Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. L. ANALYSIS 151, 161 (2014) ("[W]e can replace the redistributive regulations with efficient ones and make a corresponding adjustment to the income tax. We keep the redistributive effects but eliminate the inefficiency."); Liscow, *supra* note 25, at 2507 n.60 ("For example, the executive order currently governing federal cost-benefit analysis makes no mention of compensating those who lose from a policy, even if the utility loss from the losers exceeds the gains from the gainers."); Zachary Liscow, *Are Court Orders Sticky? Evidence on Distributional Impacts from School Finance Litigation*, 15 J. EMPIRICAL LEGAL STUD. 4 (2018) (same).

poor results in compensation to the poor. Redistribution could still be massively insufficient because of a background failure to redistribute enough through taxes. So this Article's critique is considerably deeper than the standard critique. Considering policy responses one-by-one does not ask the most important question if society is not distributionally just to begin with. There can be compensation policy-by-policy, but welfare could still be far from maximized.

This Article provides a novel account that fits with what we see in the world, explaining that voter psychology treats taxes differently as a means of redistribution, which yields a set of policy implications, to which the Article turns now.

III. IMPLICATIONS OF THE TAX PUBLIC ACCOUNT

The presence of the tax public account alone significantly disrupts standard economic policy prescriptions. On its own account, economics tries to find the most efficient way to help the poor given limited resources, and it says that cash through taxes and transfers is typically the best way to do that. Doing so leaves a relatively clean and practical prescribed approach to law: just adopt the efficient approach, which in principle is based on observable actions that people take themselves.[133] Efficiency also, in any given judicial or administrative context, has the appearance of "neutrality" in considering everyone's willingness to pay equally.[134]

However, efficiency is not "neutral" in the sense of providing the same legal entitlements to rich and poor.[135] Since it is based on willingness to pay, and the rich tend to be willing to pay more, efficient policies tend to endow the rich with larger legal entitlements than the poor. The transportation spending example, in which more money is spent on the rich than the poor because the rich are willing to pay more to commute more quickly, exemplifies this non-neutrality. Of course, this effect matters little though if taxes and transfers make up the difference.

But the tax public account renders the clean separation between taxes and transfers addressing distribution and nontax policies maximizing efficiency undesirable. The basic problem is that economics does not have an answer to how redistributive policy should be. As Kaplow and Shavell explain, even within a narrow welfarist frame, that decision would be based on multiple factors, including the declining marginal utility of income, the distribution of well-being, and interdependent preferences for well-being[136]—each of which is itself not easily measurable, to say the least.[137] And, with the tax public account, we can no longer just depend on Congress to address distributive issues through taxes. Given pervasive separate public accounts, there is little reason to expect that the efficient solution is best. This inability to provide answers that address issues of distribution is especially concerning given the possibility that the distributive questions may be as or more important than the efficiency questions that dominate work in economics, given concern over inequality.[138]

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[133] Recall that efficient policies are based on willingness to pay. We can often infer willingness to pay by observing what people actually choose—and are thus willing—to pay for a given good or service. *Supra* notes 26-28 and surrounding text.
[134] *See* Liscow, *supra* note 8 (discussing efficiency and neutrality).
[135] *Id.* (discussing when efficiency is and is not neutral and describing how it tends to provide larger legal entitlements to the rich); Dworkin, *supra* note 58 (providing a prominent early example of non-neutrality).
[136] KAPLOW & SHAVELL, *supra* note 7, at 27, 30-1.
[137] *But see* MATTHEW D. ADLER, MEASURING SOCIAL WELFARE: AN INTRODUCTION (2019) (describing how measurements can be approximated).
[138] *See supra* notes 10-17 and surrounding text; Furman, *supra* note 17.

More deeply, for welfarists, it is not even clear what it would mean to look to the redistributive preferences needed to measure well-being if separate public accounts are pervasive. If the holders of the preferences themselves to a significant extent judge distributive issues on a policy-by-policy basis, the overall redistributive preferences described in welfare may just not exist.[139]

Worse yet, questions of legality and legitimacy—which seem less urgent with the neutral-seeming goal of efficiency—come roaring back, as the wheels fall further off the simple one-pieist wagon. If administrators and judges no longer have the distributive alibi of taxation, what ought their goal be? Should they be considering economic equality themselves? Divining the popular views (or reflected-upon views?) in the particular area they are adjudicating? They could adopt efficient policies. But why would they do that, as it is neither neutral nor necessarily vindicates any notion of distributive justice? Even our language fails us here, as economists tend to consider "redistribution" relative to an efficient baseline.[140] But if that baseline itself makes little normative sense, the notion of redistribution itself is harder to get a grip on. For example, perhaps "redistribution" should be relative to a baseline representing some sort of economic equality?

Overall, the one-pieist method that seems to many to work okay, underlying economics and law and economics textbooks and countless policy analyses, simply ceases to be a useful heuristic in deciding any individual policy question. It works okay with the one non-existent benevolent social planner that economists imagine and no politics, but once there are multiple real-world actors implementing policy and the views of voters matter in practice, the fallibility of standard economic thinking quickly becomes clear. Indeed, it may be that the desire for clean answers, which efficiency analysis can lay a decent claim to producing, and the absence of a useful alternative are part of what has made such efficiency thinking continue to dominate economic analysis, notwithstanding decades of critique.[141]

But, there are useful alternatives for economic analysis. These alternatives must be much more modest in their prescriptive ambition, given the myriad normative uncertainties. But, as long as we accept some basic principles: (1) that it tends be good to move resources from the rich to the poor, all else equal, (2) typically (though not always) choice should be respected, and (3) we face resource constraints, so that there are tradeoffs in helping the poor, economics has much to contribute. It clarifies questions to answer and provides techniques to help answer to them. And it provides policy suggestions. It is to those questions and suggestions that the Article now turns. Far too often, the economics model is taken literally, but not seriously: prescribing its literal output even if doing so seems to not take its equality concerns seriously. The rest of the Article flips the script, taking the model seriously, but not literally, as it misses essential social realities.

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[139] KAPLOW & SHAVELL, *supra* note 7, at 27, 30-1. *See also* Ilyana Kuziemko et al., *How Elastic Are Preferences for Redistribution? Evidence from Randomized Survey Experiments*, 105 AM. ECON. REV. 1478 (2015) (trying to measure these preferences).

[140] KAPLOW & SHAVELL, *supra* note 7.

[141] *See* Dworkin, *supra* note 58 (providing an older critique); David Grewal et al., *Law and Political Economy: Toward a Manifesto,* LAW AND POLITICAL ECONOMY (Nov. 6, 2017), https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto/ (providing a more recent set of critiques).

IV. POLICY POSSIBILITIES

The implications of the social psychology of voters about taxation can be applied to a variety of contexts. The Article suggests a program consisting of a three-part hierarchy of responses. The first response is to advocate for the value of the most efficient forms of redistribution—a form of "debiasing"—while also educating policymakers about the importance of the tax public account. The second response is to approximate: adopt "cash-light" policies that are close to efficient cash redistribution. The third is to tilt: redistribute modest amounts across the myriad nontax policies, to move toward a fair distribution while minimizing economic distortions through a "thousand points of equity." The Section considers distribution, respects choice, and reflects tradeoffs, but it does not and cannot answer all questions. Rather, it begins with just these thin assumptions, using some rough approximations of what they could be in given instances. Questions of legality, legitimacy, dignity, autonomy, and a host of others remain important. And the precise policy and institutional choices are beyond the scope of the Article.

A. Advocate and Educate

If one is convinced that desert-based tax views result from misunderstanding rather than valid normative judgments, then a host of options arise to address the issue. The first response to misunderstandings is to educate people: explain that one's earnings are a product of laws so that pretax income is a poor indicator of entitlement, that cash taxes are often an efficient way to redistribute and that giving people choices over how to spend resources tends expands choice and reduces costs, and that heuristics that work well in small group settings may not be best for setting government policy. The project of economics—especially law and economics—the past several decades has been one of education partly along these lines, at least with respect to an emphasis on tradeoffs.[142]

Without denying that education can have an impact—indeed, evidence suggests that people are swayed by economics educations[143]—there is strong reason to think that attitudes about taxes inconsistent with the standard optimal tax model are likely durable. Indeed, while some of the specific implications of optimal tax theory have only more recently come into focus, arguments on similar grounds about the value of cash date at least to Milton Friedman in the 1960s[144] and optimal tax theory itself dates to the 1970s. These are old ideas that may cut against significant aspects of social psychology or just commonplace intuitions. Taxing institutions have not appeared to change much to incorporate them.[145]

Thus, a host of empirical questions arise when trying to confront the tax public account. What are the precise contours of desert-based thinking? How important is status quo bias? How important is an appearance of "ownership," and how specific are these sentiments to taxation versus other owned things (e.g., property in the case of eminent domain[146])? How are different types of taxation implicated? How malleable are these ideas? What do they seem to change in response to?

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[142] MANKIW, *supra* note 9; POLINSKY, *supra* note 10; COOTER & ULEN, *supra* note 10.
[143] Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159 (1993).
[144] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962), http://circuloliberal.org/livros/capitalismo-e-liberdade.pdf.
[145] *See supra* Section II.B.
[146] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1156 (1967).

And a host of deeper normative questions arise: Does pretax income have moral weight? Does desert inhere in effort, in inborn talent, in talent that one works for? Does taking individuals seriously as individuals mean that the government should not tax based on genetic predisposition to earn money? This Article cannot answer those questions. And it does not need to for policy responses beyond education.

In any case, given the apparent durability of these beliefs, even if cash is best, the downsides of alternatives to cash needs to be set against the risks of adopting policies that are insufficiently attentive to equity. Section V.D returns to the extent to which these commonplace intuitions are fixed.

Law school courses commonly describe the efficient solution as the "law and economics" prescription.[147] If "law and economics" means welfare-maximizing, and if welfare-maximizing means "in the real world," and if one is convinced that desert is important in tax policy, then this result does not hold. It may be unproductive to train students in this way, as they may be unaware of the nature of the underlying assumptions required by optimal tax theory. An implication of the Article is that there is value in training future voters and policymakers to be more keenly aware of good policies that are politically achievable.

Aside from education—both making the case for tradeoffs and choice, and the reality that full fungibility may not be available—the Article turns next to two policy options, given the continued presence of the tax public account.

B. Approximate: Congress and Cash-Light Tax Policy

The second set of responses in the hierarchy is approximating first-best cash-like policies, if those are indeed best.[148] This subsection considers three types of such policies. First, some direct transfers can de facto redistribute cash, but not look like they do. Consider, for example, a "necessities account" that can only be used on necessities like food, utilities, commuting, housing, clothing, education, and healthcare would be close to a cash transfer without looking that way because the poor mostly spend money on those things anyway.[149] That account could be phased out at higher incomes, and it would effectively function like a cash transfer to the poor.

Second and relatedly, policymakers could aid low-income taxpayers through targeted "tax expenditures," which reduce taxes for engaging in certain behaviors. Tax expenditures tend to be politically popular, perhaps driven in part by desert to pretax income, since they "reduce taxes" and thus let people keep more of their income.[150] Nevertheless, tax expenditures that merely transfer cash and do not change incentives are typically frowned upon by the tax policy community.[151] This Article flips the standard logic on its head. Rather than being a bug, not

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[147] *See* Fennell & McAdams, *supra* note 36, at 1054 (2016) ("Conventional law and economics says no: the judge should decide the rule solely on grounds of efficiency and leave distribution to the tax-and-transfer system, because doing so will generate fewer behavioral distortions.").

[148] For tax policy implications when pretax income has moral weight, *see* Steven M. Sheffrin, *What Role Can Desert Play in Designing Tax Policies*, 15 PITT. TAX REV. 137, 152-60 (2017). This Article is agnostic on that question.

[149] *See* Goldstein, *supra* note 18 (showing that the poor overwhelmingly spend their money on such "necessities").

[150] Conor Clarke & Edward Fox, *Perceptions of Taxing and Spending: A Survey Experiment*, 124 YALE L. J. 1252 (2015) (describing the apparent ease of providing tax breaks instead of economically equivalent direct transfers); Jake Haselswerdt & Brandon L. Bartels, *Public Opinion, Policy Tools, and the Status Quo: Evidence from a Survey Experiment*, 68 POL. RESEARCH Q. 607 (2015) (same).

[151] *See, e.g.,* Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Reforming Tax Incentives into Uniform Refundable Tax Credits*, BROOKINGS INST. (August 2006), https://www.urban.org/sites/default/files/publication/50391/1001020-Reforming-Tax-Incentives-into-Uniform-

changing behavior could actually be a *feature*: tax expenditures can become a way of transferring cash to low-income people without distorting their behavior.[152]

Consider again the example of transportation spending. If the optimal policy is a universal cash demogrant, then a refundable commuting tax credit through the tax code would functionally contribute to a demogrant while being framed as spending "for transportation," at least for those who use transportation. In particular, since tax subsidies for transportation spending largely provide relief based on what people were *already going to spend*, they effectively providing a cash transfer. Some deductibility or credits for spending on transportation, which then phases out at higher incomes, to target the benefits to lower-income earners could then be desirable. Doing so may put this expenditure of government resources in the necessities public account, since people may need to commute to work to lead a decent life.

There is significant ongoing debate—including during the debate concerning the 2017 Tax Act, which curtailed these benefits—about the extent to which transportation expenditures should be tax deductible.[153] Of course, there are a host of concerns—on administrability, transactions costs, treatment of those who use versus don't use transportation, to list only a few issues beyond the scope of the Article. But the logic here suggests at least unappreciated benefits of tax expenditures like the transportation spending deduction that can target aid to low-income households.

Third, Congress could take advantage of employer-side taxes and subsidies to alter pretax incomes and therefore perceptions of desert. In particular, Congress could *tax* high-income workers on the employer side, lowering their pretax income (and thus desert), and it could *subsidize* low-income workers on the employer side, increasing their pretax income. Consider first taxing high-income workers on the employer side. Such a tax would presumably lower the pretax wages paid to these employees because employers would have to foot more of the tax bill.[154] As a result, the poster price of their salaries over which they seem to have ownership would decline, reducing desert and easing taxation. We are accustomed to thinking of employees as earning a salary and then paying taxes based on that salary. In fact, employers already pay taxes based on their employees' salaries, principally through payroll taxes that nominally fund Social Security and Medicare[155] but also for purposes like unemployment insurance.[156] And, for high-income executives, the tax code limits the amount of compensation that publicly-traded employers can count as business expenses.[157] Of course, there would be implementation difficulties, such as the incentive for a high-income employee to split his job at one company into two lower-paid jobs at two companies to avoid the tax. But, if voters read such taxes partly

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Refundable-Tax-Credits.PDF (arguing that the government should use refundable tax credits, rather than tax expenditures, since tax expenditures have a substantially lower behavioral effect).

[152] But, with limited refundability, tax expenditures can only help the very poorest so much.

[153] I.R.C. §§ 132(f)(8) (suspending the qualified bicycle commuting reimbursement exclusion), 274(a)(4) (disallowing businesses from deducting qualified transportation fringe benefits), 512(a)(7) (same) (2018); Tax Cuts and Jobs Act, Pub. L. No. 115- 97, §§ 11047, 13304, 13703, 131 Stat. 2054, 2088, 2123, 2169 (2017); I.R.S. Notice 2018-99 (Dec. 10, 2018) (offering guidance for implementing TCJA transportation benefits taxation changes); Daniel Di Martino, *Tax Treatment of Transportation Fringe Benefits*, TAX FOUND. (July 22, 2019), https://taxfoundation.org/transportation-fringe-benefits/ (advocating for treating transportation benefits like wages).

[154] GRUBER, *supra* note 19.

[155] I.R.C. § 3111 (2018) (imposing taxes on employers based on employee wages for hospital and old age and disability insurance).

[156] I.R.C. §§ 3301-11 (2018) (imposing unemployment taxes on employers and setting out the approval process for state unemployment systems).

[157] I.R.C. § 162(m) (2018) (limiting the deductibility of salaries at publicly held corporations).

as taxes on businesses, rather than as taxes on the earners themselves, then it may be tolerable to impose such taxes on employers.

Likewise, since there appears be an aversion to providing cash transfers or tax credits in excess of an individual's tax liability, perhaps a subsidy to employers for hiring low-income workers would be a feasible way to drive up wages for low-skilled workers, and thereby increase their desert.

These are changes that could be implemented to address distributive issues by Congress through tax policy. If education and tax policy fail though, the question remains how other policies should change in the presence of those failures. The Article turns to those next.

C. Tilt: A Thousand Points of Equity

If Congress is redistributing insufficiently now and likely in the future because of the tax public account, what should various institutional actors, including but not limited to Congress, do then? If advocacy and approximation are insufficient, then every part of government should tilt its policies to be more redistributive, where doing so is consistent with legality, legitimacy, dignity, and other values, and where efficiency costs are not large. In other words, rather than adopting a small number of big redistributive policies, we should adopt a "thousand points of equity" approach: where politically feasible, redistribute modestly more than the standard "efficient" amount up to the point that the efficiency costs become too large. Though the Appendix gives one example of how an administrative agency could respond, this Article cannot say what policy should be adopted and by whom; that is beyond scope.

Consider Table 1, which gives a 2x2 grid of stylized options for achieving equity, clockwise starting in the top left. Box 1, in the top left corner, is roughly the status quo: little nontax redistribution and little tax redistribution, leading to high inequality. The standard prescription is the top right (box 2): high tax redistribution, but low nontax redistribution. Unfortunately, under the theory of separate accounts with desert-based tax accounts, this option is not available. Box 3 in the bottom right, with high tax and nontax redistribution is also not available.[158] The final option is the bottom left (box 4): in the absence of high redistribution through taxes, redistribute more through nontax means. Otherwise, if tax redistribution remains low because of desert-based thinking, the only other option is the first: low redistribution through both types, leading to the high inequality that we see today. Of course, in practice, we do see some redistribution through taxes, so the ideal would perhaps be a modest amount of redistribution through nontax means.

Keep in mind that "redistribution" is a term of art here. The baseline from which "redistribution" is judged is the "efficient" allocation in which, for example, the rich get far more transportation spending than the poor, not equal transportation spending.

This subsection offers an illustration with the transportation spending example before moving onto more general implications.

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[158] *See also* Section VI.G, which considers endogenous interactions between tax and nontax redistribution, including the possibility that nontax redistribution could encourage tax redistribution.

Table 1: Options for Achieving Equity – In General

		Tax redistribution	
		Low	High
Nontax redistribution	Low	1. High inequality. (Status quo)	2. Modest inequality. Standard prescription (Not available)
	High	4. Modest inequality. Thousand points of equity (Future?)	3. Low inequality. (Not available)

1. Example of Regulatory Cost-Benefit Analysis for Transportation Spending

Consider again federal regulatory cost-benefit analysis ("CBA"). As suggested in Section I, the standard view in economics prescribes efficient outcomes that ignore distributional outcomes—for example, the time of the rich valued at more than the time of the poor. Typically, these arguments largely ignore real-world political institutions. David Weisbach does consider political institutions and still comes to the view that distribution should not be considered in regulatory cost-benefit analysis.[159] He points to "a version of a political Coase theorem" in which the legislature undoes the distributional choices of the administrative agency.[160] He says that, "at a minimum a claim that an agency can change that [distributive] outcome needs a story explaining why and how." This Article provides that explanation: Since many ordinary people view issues of distribution through taxes and other means differently, the legislature is unlikely to respond to a change in distribution from an administrative agency with tax policy changes that fully offset the administrative agency's actions. This explanation significantly constricts the political Coase theorem. And, in any case, as described earlier, even if all the distributional impacts of efficient regulation were undone by Congress, that does not imply that society would be distributionally just.

Some do dissent from the efficient CBA view. For example, Adler and Posner prominently argue that CBA should be based on well-being, not efficiency.[161] They note that policymakers could "launder" preferences—that is, treat everyone as if they have the same income.[162] They do not describe how to conduct CBA in the context of Congressional action (and inaction) on tax policy. Richard Revesz argues for the establishment of a body to consider the distributional consequences of regulations on a case-by-case basis and address those consequences when they become severely negative enough.[163] However, he explicitly would not consider general distributional consequences.[164]

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[159] Weisbach, *supra* note 132, at 178. Weisbach does allow the possibility that an agency should consider distribution "based on the particular circumstances."
[160] *Id*. at 177.
[161] Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165 (1999); MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006).
[162] *See id.* at 130–31, 142–46, 152 (2006) (discussing adjustments to willingness to pay to compensate for parties' different incomes and potential objections to such an approach). *See also* Matthew D. Adler, *Benefit–Cost Analysis and Distributional Weights: An Overview*, 10 REV. OF ENVIR. ECON. & POL. 264, 269-73 (2016) (same). What the "distributional weights" should be is a difficult question for policymakers to answer.
[163] Richard L. Revesz, *Regulation and Distribution,* 93 N.Y.U. L. REV. 1489 (2018).
[164] *Id*. at 1578 (noting that "[s]keptics would say that only Congress can effectively and constitutionally undertake social policy of that magnitude").

Consider the options for regulatory cost-benefit analysis for transportation spending in Table 2, which parallels Table 1. (Again, the Appendix contains a calibrated model for more technically-oriented readers.) As described in Section I, the standard economics prescription is to have high taxes on the rich, along with large cash transfers to the poor, and then relatively little transportation spending on the poor (box 2, top right). However, under the theory of separate accounts with desert-based taxation, we should not expect that highly redistributive taxation to arise, including with to relatively equal transportation spending (box 3).

Table 2: Options for Achieving Equity – Transportation Spending Illustration

		Tax redistribution	
		Low	High
Transportation spending on the poor	Low	1. Transportation spending: more on rich than poor. Cash transfer to poor: small.	2. Transportation spending: more on rich than poor. Cash transfer to poor: large.
	High	4. Transportation spending: roughly equal. Cash transfer to poor: small.	3. Transportation spending: roughly equal. Cash transfer to poor: large.

Given that the cash transfers are not coming, egalitarian-minded policymakers need to look elsewhere in the thousand points of equity approach (box 4 in the bottom left). Transportation spending is one such place. What actual policy should be will depend on a host of factors, some of which are described in Section V. And the Appendix shows that, under some plausible assumptions, roughly similar spending on the rich and poor is reasonable. But politically attentive regulators will recognize that there is nothing "neutral" about valuing the time of the rich more than the time of the poor and thus spending more on the rich than the poor. That is efficient, but it is not "neutral." In fact, it transparently biases allocations toward the rich. And, without the justification that taxes and transfers will address the problem of distributive equity, the rationale for efficient policymaking disappears.

None of this is to say that there is not a cost to shifting transportation funding from the rich to the poor. There is a cost: A quicker commute for the rich, who instead work, contributes more to economic output than a quicker commute for the poor. There will be some bus projects that save a lot of time for the poor, so are worth doing in any case, and there will be some airport projects that save little time for the rich, so are not worth doing in any case. The question is how to handle projects that save a modest amount of time. Under the status quo "efficient" scenario, such projects would only be built for the rich, not the poor. Under the "thousand points of equity" scenario, they would be built for rich and poor.

The alternative is the status quo: immiserating the poor (box 1, top left). Transfers to the poor are low because of desert-based views, but regulators nevertheless allocate transportation spending efficiently. That is, transportation planners are naïve and allocate spending as if there were large cash transfers, even though we have no such thing. This policy harms the poor. Current Department of Transportation policy is erroneous because it is inattentive to Congress's actions on cash transfers. The poor receive too little cash from Congress and too little transportation assistance from the Department of Transportation. Thus, current policy is problematic because of the high social value of the income the poor earn from being able to commute to work more quickly.

Importantly, under the separate public accounts theory, it is completely consistent for people to both dislike strongly redistributive taxation and wish to have more egalitarian policies toward the poor. Rather, the view is about the *particular means* of taxation. Taxation is *just one tool* for addressing inequality and views about taxation do not necessarily reflect overall redistributive views. Implicitly, people are more comfortable when money is earned through work, which is enabled by more transportation spending.

As the Appendix shows, the welfare impacts of adopting "worst of both worlds" policies can be large. Regulators' adoption of efficient policy prescriptions risks considerably reducing welfare when Congress does not use economists' chosen tool of taxes to redistribute in multi-step policymaking with no overall social planner. And, recall, cutting-edge research in economics suggests that the amount by which the US tax code implicitly weights rich versus poor is only a small fraction of the declining utility of money from poor to rich.[165] There is a lot of redistributive space for nontax policy to productively fill.

2. In General

This same reasoning can be applied to many areas of law, which this subsection does. But first, economics suggests two important lessons, to consider alongside the host of other factors one might want to consider in policy design, as discussed in the next Section.

The first lesson is that, for modest amounts of redistribution in any given policy, typically the redistributive benefits are large and net costs are small.[166] Consider shifting transportation spending from the rich to the poor, starting from the efficient policy of maximizing total income. The key point is that transportation planners start with the best available projects and then move onto worse ones. So the first shifted dollar is very similar to the efficient level of spending, producing roughly as much income for the poor as is lost for the rich and thereby resulting in miniscule net costs. The same reasoning applies generally: typically the net costs of adopting modest amounts of redistribution in any given area are small and the redistributive benefits are large because of the availability of high-return ways of spending money close to the "efficient" use of resources. Thus, even for the most efficiency-minded person, the costs of modest differences from the efficient ideal to achieve greater equality are not very big.

The second key insight is the policy implication that arises out of the first insight: We should adopt a "thousand points of equity" approach of redistributing modestly in many places. That is not to say that we should redistribute everywhere; sometimes the benefits will not justify the costs. But, since typically the marginal efficiency costs of redistributing are small at first and then climb for any given policy, it is all else equal better to increase redistribution a modest amount through many policies rather than increase redistribution a lot through few policies.

Consider again shifting transportation funding from the efficient policy. As more and more funding shifts, each dollar increasingly produces less income for the poor—for example, from building bus routes in less-trafficked neighborhoods. And each shifted dollar increasingly loses more income for the rich—for example, from losing train projects in highly-trafficked neighborhoods. So, while shifting $1 million from rich to poor might result in only $10,000 in lost income overall, shifting a *second* $1 million might result in several times that amount in lost income because it produces little income for the poor and loses a lot for the rich.

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[165] Hendren, *supra* note 116.
[166] GRUBER, *supra* note 19.

Thus, applying this reasoning across many policies by recognizing the diminishing returns with any one policy typically suggests adopting lots of modestly redistributive policies, instead of few highly redistributive policies. Doing so significantly helps the poor at modest cost to the rich and avoids very redistributive policies that—once they become too redistributive—start doing relatively little to help the poor at high cost to the rich.[167] That way, we can get more redistributive bang for our buck, given limited resources.

The Article's "thousand points of equity" proposal does not require a central planner. Rather, each actor needs to have some sense of how much a marginal dollar is worth in the hands of the poor versus the rich and the efficiency costs of redistribution through the means available to that actor. If there is more or less redistribution generally over time, each actor can, in principle, adjust on her own. Of course, these changes would need to operate against a backdrop of legitimacy, legality, due process, rights, and a host of other values beyond the scope of the Article.

Nevertheless, difficult questions arise when considering alternatives to efficiency in regulatory agencies: Even though efficient cost-benefit analysis is typically not Congressionally mandated[168] and efficiency is not "neutral," what is the alternative? While tax public accounts imply that efficient nontax policy is not justified by redistributive taxation, they also do not dictate a desirable amount of distribution. And it may still be normatively problematic to set such explicit distributional goals administratively. Perhaps a President could dictate such a goal. But there is no normatively neutral place from which to draw it, and the desirable distribution is a deep question that is beyond the scope of the Article. It is nevertheless worth emphasizing that policies tend to have distributional consequences and, if efficient policymaking is not desirable, then there will be some other distributional consequence to its alternative. In other words, a dictate from the top may be problematic, but making *some choice* is unavoidable. And this Article at least suggests a fruitful direction for policy.

Courts

The analysis for courts is in some ways similar to that for agencies. Like agencies, courts are governed by fairly expert actors who are (at least arguably) less accountable to the voters than Congress is. It seems unlikely that many current statutes would permit explicit judicial imposition of distributional weights. But, at least in marginal cases, judges could err on the side of distribution toward lower-income people. Or statutes could give latitude to juries to conduct

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[167] *See* David Gamage, *How Should Governments Promote Distributive Justice: A Framework for Analyzing the Optimal Choice of Tax Instruments,* 68 TAX L. REV. 1, 11 (2014) (making a related point about how imperfections in taxation mean that a variety of tax instruments should be used).

[168] Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 287, 288 (2019) (describing how standard CBA is typically an innovation of the executive branch, noting that of all the major environmental statutes, Congress prescribed formal CBA in only one); Robert P. Bartlett, *The Institutional Framework for Cost-Benefit Analysis in Financial Regulation: A Tale of Four Paradigms?*, 43 J. LEGAL STUD. S379, 384-87 (2014) (similar, for financial regulations); Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 190-92 (2004) (arguing that, at least the Congresses of the 1970s—which were responsible for much of the environmental legislation that has typified Congressional CBA use—not only did not intend to require the formal, highly quantified form of CBA that we now consider standard practice, but in some cases explicitly looked to avoid it).

such redistribution, such as allowing significant awards for pain and suffering, which some evidence suggests juries use to provide larger damages to poorer groups.[169]

Probably more so than agencies, court-driven redistribution would raise issues of expertise, such as understanding what the distributional impacts in a given instance are. And, as for agencies, there is a risk of violating norms that legitimate the courts, at least if such reasoning were explicitly stated, which could undermine the rule of law. On the standard welfare account though—where legitimacy does not matter—courts should implicitly adopt distributional weights and redistribute accordingly. Ultimately such reasoning puts pressure on the standard welfare account: many probably find such reasoning quite problematic for the courts. But, as for agencies, courts make decisions with distributional consequences. And, if efficient policymaking is neither justified on its own account nor justified by appropriately redistributive taxes, then it is not clear what distributive values judges should adopt, given the non-distributionally-neutral nature of efficiency.

Legislatures & in-kind provision

A final set of policy responses concern the panoply of programs that legislatures could tilt toward the poor. Consider Congressional decision-making on healthcare. The standard economic view is that someone in his fifties earning $20,000 would not be willing to pay the $8,000 that health insurance costs for people of that age and would instead prefer cash.[170] But the theory of separate public accounts and desert-based views on taxation strengthen the case for providing healthcare to low-income people. At the same time, commonplace rights-based views on the provision of basic healthcare strengthen political feasibility.[171] One starting point for analyzing whether provision of healthcare is welfare-enhancing as follows: estimate the willingness to pay of the poor for the healthcare, appropriately adjust by the right distributive weight, and compare that to the cost. So, one would want a number X such that a dollar in the hands of those earning $20,000 is worth X more in welfare terms than for the average person. Suppose that X is 4. Then, if the poor person is willing to pay $3,000 (more than one quarter of $8,000), healthcare should be provided. And, if the poor person is willing to pay only $2,000 (less than one quarter of $8,000), healthcare should not be provided. Of course, other concerns like rights may dominate here in practice, but even on standard economics grounds, this reasoning could dictate in-kind healthcare provision.

Similarly, standard logic suggests that low-income parents would likely prefer to receive cash instead of either subsidies or directly provided childcare. Childcare is expensive, and low-income people need cash. Of course, there may be important standard efficiency reasons for childcare provision, such as increasing the children's lifetime earning capacity, for which parents may be unwilling or unable to pay. But, beyond the efficient provision, "inefficient" childcare is good if desert-based taxation places considerable limits on how redistributive taxes will be and if the willingness to pay of the poor is close enough to the cost of provision to justify the expense. Similar reasoning can be applied to spending on education, paid parental leave, nutrition, and a panoply of other programs.

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[169] Lucinda Findley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004) (arguing that damages caps had a disproportionate impact on women, children, the elderly, the disabled, since juries had been implicitly using categories like pain and suffering to make up for the fact that actual damages awards for these categories—being based on lost income—often were disproportionately low).

[170] *See supra* note 69.

[171] *See supra* note 65 and surrounding text.

Likewise, consider fines based on income. The classic efficiency argument is that fines should not be based on income.[172] So, if a rich person speeds, she gets a $200 ticket. And, if a poor person speeds, she gets the same ticket, even if it causes a great hardship to the poor person but not the rich person.[173] But, if the justification that it would be better to help the poor through taxes no longer holds, then it does make sense to charge the rich more than the poor for speeding or other civil infractions, even on standard economics grounds.

Finally, while some changes (e.g., reallocating transportation funds or changing some legal rules) would not cost the government money, others would require additional revenue. Designing such revenue-raisers is beyond the scope of this Article, but there are many options. Recall that under standard economic theory, taxes on capital should be zero or low.[174] But, if labor income taxes stay relatively low, we could raise capital income taxes on the rich—perhaps so that capital income no longer had a lower, preferential rate.[175] Indeed, there are myriad options for taxing capital.[176] Alternatively, the U.S. could do what every other advanced country has done and adopt a national "value-added tax," which is similar to a tax on consumption.[177] Consumption taxes are regressive, since poorer people consume a larger share of their income, but not nearly as regressive as social spending is progressive, so a value-added tax to fund more social spending would go far to reduce inequality.[178] Indeed, this combination of only modestly progressive taxes and very progressive spending is exactly what the Nordic countries have employed, while becoming some of most progressive—and also rich—countries in the world.[179] Alternatively, state and local governments—whose role in redistribution has typically been criticized by scholars—could play a larger role in financing social spending.[180]

V. CONSIDERATIONS IN POLICY DESIGN

This Section describes seven factors to consider when setting policy to redistribute. This Article cannot say where policy at the Department of Transportation or elsewhere should end up. But it can point to considerations that would influence that decision, as policymakers decide what institutions should do more to achieve equity, how, and by how much. On many questions, we need more empirical work. The answers to other questions turn on normative considerations.

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[172] *See, e.g.*, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).
[173] For example, Finland has income-based fines. Joe Pinsker, *Finland, Home of the $103,000 Speeding Ticket,* ATLANTIC, (Mar. 12, 2015), https://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/.
[174] Mankiw et al., *supra* note 15; Diamond & Saez, *supra* note 35.
[175] I.R.C. §1 (providing income tax rates).
[176] *See, e.g.*, David Kamin, *Taxing Capital: Paths to a Fairer and Broader U.S. Tax System*, https://equitablegrowth.org/wp-content/uploads/2016/08/081016-kamin-taxing-capital.pdf.
[177] *Worldwide Tax Summaries: Value-added Tax (VAT) Rates*, PRICEWATERHOUSECOOPERS (Feb. 1 2020), http://taxsummaries.pwc.com/ID/Value-added-tax-(VAT)-rates (showing taxes across countries).
[178] Gilbert E. Metcalf, *Value-Added Taxation: A Tax Whose Time Has Come?*, 9 J. ECON. PERSP. 121, 133-34 (1995) (describing the regressivity of the tax, but also noting some debate on the topic).
[179] Kyle Pomerleau, *How Scandinavian Countries Pay for Their Government Spending*, TAX FOUND. (June 10, 2015), https://taxfoundation.org/how-scandinavian-countries-pay-their-government-spending/ (describing the Nordic model); OECD, *Income Inequality* (last visited Feb. 1, 2020), https://data.oecd.org/inequality/income-inequality.htm (similar).
[180] *See, e.g.*, Clayton Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U.L. REV. 1057 (2007) (summarizing the traditional criticism of local redistribution as distorting residential location decisions by driving out wealthier residents and attracting welfare recipients).

A. Redistributive Goals and Efficiency Costs

A first factor is the tradeoff that one is willing to make between redistribution and efficiency. The tradeoff in the transportation example arises from the fact that the rich earn more than the poor when they can work longer hours, so spending more money on the poor—for the same commuting time savings—leads to lower total earnings, which means that society is poorer overall.

There may be uncertainty in the amount of redistribution that is desirable. As the Appendix explains, if we are unsure whether taxes redistribute the right amount or whether they redistribute too little, we should still redistribute through nontax means. A regulator would then want to engage in reasoning resembling "error cost" analysis in antitrust, which compares the costs of, say, erroneously allowing and erroneously preventing a merger.[181] The reason for still redistributing under these circumstances is the same as why it is good to redistribute a modest amount across many policies: the costs of deviating from the ideal policy increase as one gets further from the ideal policy. So, if we are unsure which of two policies is ideal, adopting a policy close to the middle of the two possibilities is prudent, so that there are not large deviations from either.

B. Other Nontax Policies Currently Redistribute

Nontax policies like those in housing and healthcare arguably already redistribute beyond the efficient amount.[182] The presence of nontax redistribution reduces the desirable amount of redistribution through policies like transportation.[183] The more existing in-kind redistribution there is, the less others like transportation planners should redistribute.

This Article analyzes redistribution through nontax legal rules versus an efficient baseline. A separate, but related, question is whether nontax policy should redistribute more than *current policy* does, not just more than is efficient. This Article cannot decisively answer that question, as it depends on what distribution is just. Nevertheless, it is worth noting that polling and our political discourse continue to suggest widespread concern about inequality. For example, a recent Pew Research Center poll found that 82% of respondents thought that income inequality in the U.S. was a big or moderately big problem.[184] And across the political spectrum, there is discussion of the problem of inequality. For example, Mitt Romney, Jeb Bush, and Rand Paul all decried the continuing rise in inequality during the Obama presidency.[185]

But why might separate public accounts lead the political system to redistribute insufficiently today? In other words, why doesn't nontax redistribution make up for insufficient tax redistribution? We cannot know, but we can speculate. The first reason is institutional: Anti-redistributionist lay tax views may play a larger role setting tax policy than pro-redistributionist lay nontax views do setting nontax policy. The reason is the unusually large role of the more

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[181] *See, e.g.*, Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 222–25 (1979); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 97 (2010).

[182] *See supra* notes 67, 68 and surrounding text (on housing); *see also* Section IV.C.2 (on healthcare).

[183] Note 35 *supra* describes how the optimal income tax results described in the Article are for labor, but not capital, income taxation. Sizable taxes on capital income also decrease the desirability of redistribution through other nontax means.

[184] *See, e.g.*, PEW RESEARCH CENTER, *supra* note 1.

[185] *See* Rampell, *supra* note 2.

voter-responsive Congress in setting tax policy relative to other policy areas, where experts in agencies and on courts may hold more sway. If those nontax experts focus on efficiency, then the combination of efficient nontax policy and insufficiently redistributive taxes would yield insufficient redistribution overall.

Contrast Congress establishing tax rates with the Department of Transportation allocating transportation funds. Congress largely sets the distributional impacts of taxation, with a fairly minor role in setting distributional impacts for courts and agencies.[186] The tax code specifies exact tax rates for exact incomes,[187] which are typically set in heated, salient political battles.[188] The thousands of pages of regulations and the occasional court decision also matter, but the distributional die is largely cast by Congress. Of course, many factors influence Congressional decision-making, but one important factor is the views of their constituents, especially in salient political battles—which will put a heavy drag on the amount of redistribution through taxes given the prominence of desert-based views.[189]

For the allocation of transportation spending in the grant programs described in this Article, Congress is not nearly as prescriptive. While giving little guidance, it appropriates money to the executive branch, which decides how to allocate the funds. Indeed, for many regulatory and spending programs, Congress delegates to agencies a major role in distributional decisions, whether because of concerns about expertise, limited capacity, reducing logrolling, or otherwise.[190] For example, specifying each transportation project that should be funded may be challenging for Congress and may not reflect any notion of cost-effectiveness. Of course,

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[186] DAVID EPSTEIN & SHARON O'HALLORAN, DELEGATING POWERS 199 tbl.8.1, 202-03 tbl.8.2 (1999) (finding that Congress delegates less in the area of taxation than almost any other policy area); James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 252, 248-53 (2015) (explaining that Congress rarely delegates taxing authority to the IRS and Treasury Department, noting that "[i]t is commonly understood that U.S. tax policy is, to a remarkable (and unusual) extent, determined by Congress not only in its broad outlines but also in its details.").

[187] I.R.C. § 1 (setting tax rates at specific rates for specific income levels for specific types of income).

[188] MICHAEL J. GRAETZ ET AL., FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 6-12 (8th ed. 2018); (providing a history of the income tax, including battles over the rates and structure of the system during the Civil War, World War II, the Tax Reform Act of 1986, the 2001 Bush tax cuts, and the 2017 Tax Act). More generally, consider the prominence of debates about taxation during the 2017 Tax Act and a typical presidential campaign.

[189] GARY C. JACOBSON & JAMIE L. CARSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 261-267 (2019) (reviewing studies on policy congruence, finding relationship between constituent beliefs and member votes).

[190] *See* Cary Conglianese & John Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PENN. L. REV. 1587, 1597 (2016) ("under most statutes, Congress has delegated authority to administrators; they are the officials granted the express powers to command or defer in ways that carry out the aims and responsibilities contained in specific legislation."); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 698 (1994) ("[B]y delegating power, legislators can minimize the inefficiencies of legislative logrolls, take advantage of policy expertise, and keep their workload manageable." (internal citations omitted)). *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Peter H. Aranson et al., *Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 21-26, 30-36 (1982) (discussing managerial, political, and economic rationales for delegation to agencies); Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006) (arguing that agencies possess unique capabilities for interpreting congressional commands). Congress may delegate more because of reductions in Congressional staffing levels. Lee Drutman & Steven Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/ (showing the number of congressional committee staff dropped sharply in the mid-1990s).

Congress and legislatures are quite prescriptive in some areas, such as provision of health insurance and housing vouchers. But in many other nontax areas—antitrust law,[191] tort law,[192] environmental law,[193] and transportation spending[194]—agencies and courts hold great sway in setting ultimate distributional impacts.

Given what is arguably a greater importance of experts in many nontax areas, it is reasonable to think that the *ideas* that experts hold could be important.[195] Reasonable people can disagree about the relative importance of experts versus lay voter views in legislation versus administrative decisions and the judiciary, but many argue that experts have more sway in the administrative state than in Congress,[196] which is sensible because one of the main justifications

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[191] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harv. Bus. Sch. Working Paper No. 19-110, 2019), https://www.hbs.edu/faculty/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf (tracing the history of judges' interpretation of antitrust law in response to external events).

[192] GUIDO CALIBRASI, A COMMON LAW FOR THE AGE OF STATUTES 32-34 (1985) (tracing the history of judicial interpretation of the Federal Employers Liability Act and common law tort law); Keith N. Hylton, *Evolution of Tort Law*, *in* TORT LAW: A MODERN PERSPECTIVE 32 (2016), https://doi.org/10.1017/CBO9781316408902.003 (tracing the evolution of tort law and negligence theories).

[193] David S. Tatel, *Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVIRON. L. REV. 1 (2010) ("As environmental lawyers well know, admin is where the action is.").

[194] *See supra* note 71 and surrounding text (explaining how the Department of Transportation chooses to allocate funds). *See also* U.S. DEP'T. OF TRANSP., BUDGET HIGHLIGHTS: FISCAL YEAR 2020, at 6 (Mar. 7, 2019), https://www.fhwa.dot.gov/cfo/dot_bh2020_030719final.pdf
(explaining that the Trump Administration redirected transportation grant funding towards rural areas).

[195] See Elliott Ash et al., *Ideas Have Consequences: The Impact of Law and Economics on American Justice*, March 2019 (draft) (conducting empirical analysis showing that training in economics impacted judges' decisions); MACLEAN, *supra* note 126; STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564, 656 (2014) ("The central point that emerges from our research is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."); Dietrich Rueschemeyer, *Why and How Ideas Matter*, *in* THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS (Robert E. Goodin & Charles Tilly eds., 2006) ("That ideas matter in politics is beyond question."); Claude S. Fisher, *Do Ideas Matter?*, BOS. REV. (Sept. 22, 2014), http://bostonreview.net/blog/claude-fischer-do-ideas-matter (arguing that ideas, especially in economics, matter, both as directly influential and as self-fulfilling prophecies); Cowen, *supra* note 6 (describing large influence of economists in the federal bureauracy).

[196] BRUCE BIMBER, THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT 5-11 (1996) (discussing the constant struggle of Congress's Office of Technology Assessment (OTA) to remain nonpartisan in the face on constant funding and other partisan political pressure); Nicholas Parrillo, *Jerry L. Mashaw's Creative Tension with the Field of Administrative Law*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT 3 (Nicholas Parrillo ed., 2017) ("The task of improving the quality of administrative justice is one that must be carried forward primarily by administrators. The task is too complex for the nonexpert . . . ." (quoting JERRY MASHAW, BUREAUCRATIC JUSTICE (1983))); K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671 (2018) (book review) (describing the importance of expertise in and the threats of privatization and the unitary executive to the administrative state); Edwin E. Witte, *Administrative Agencies and Statute Lawmaking*, 2 PUBLIC ADMIN. REV. 116, 121 (1942) (explaining that bureaucrats have substantial influence on the legislative process because of the "superior knowledge which administrators have in their special fields").

for delegation is expertise.[197] And, since experts in agencies[198] and on courts[199] have been trained for decades to follow the kind of efficiency-mindedness that would reduce redistribution through nontax means, those views could have an impact. Recall that even the relatively pro-redistribution Obama administration had the rules that weighed the time of the rich more than twice the time of the poor in the transportation spending rules. Thus, the combination of insufficiently redistributive taxation set by Congress (disproportionately reflecting lay desert-based tax views) and efficient, not redistributive nontax policy set by agencies (disproportionately reflecting expert efficiency-minded nontax views) could yield a mix of policies that insufficiently help the poor.

A second, related, and reinforcing explanation could be the fragmented, myriad nature of lay beliefs. Specifically, the salience of taxation for voters significantly limits Congress's redistributive taxation, while the low profile and myriad nature of many nontax issues could reduce the impact of lay views on those issues. There is nothing requiring similarly strong beliefs across different domains. About the one big, high-salience issue that is supposed to be used for redistribution—taxes—people may have strong views. In contrast, about the myriad nontax issues, people may simply have less strong views on average, as it may be difficult to have strong views on so many issues. Indeed, as Peter Diamond and Jerry Hausman famously observed, on policy issues that are quite abstract in their own personal lives, people may just not have well-formed views at all.[200] Transportation spending could be one of those issues on which individuals have no particular view. Furthermore, the impact of lay views on nontax policy could especially be dissipated because these decisions are made across many small policy areas, each of which is individually low-salience.

Even if people do have well-defined views across the myriad nontax issues, those views are likely not all redistributive, so the nontax views may not compensate for the insufficiently redistributive tax views. Healthcare may be viewed as a necessity and a right, thus making views redistributive relative to the efficient baseline. In contrast, torts[201] may be viewed as principally about compensation, not distribution, and thus not be redistributive. It would be surprising if, across the myriad nontax means, people had consistently redistributive public accounts. So the combination of sometimes-redistributive, sometimes-not-redistributive views about nontax policies fails to compensate for the insufficiently redistributive views about tax policy.

Put differently, people may want greater equality of resources or opportunity, but achieving greater equality of resources or opportunity is not a concrete policy choice. Suppose, as is the case in the transportation illustration, that redistributing more than the efficient amount

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[197] Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 94 (1985); JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY (2002) (noting that administrators are more likely to have technical expertise than legislators).

[198] SUNSTEIN, *supra* note 8, at 6-21 (discussing the "Triumph of the Technocrats" across the Reagan, Clinton, and Obama administrations); Heinzerling, *supra* note 168 (describing "how, over several decades, cost-benefit analysis came to dominate federal environmental policy."); Posner & Landes, *supra* note 8.

[199] Ash et al., *supra* note 195.

[200] Peter Diamond & Jerry Hausman, *Contingent Valuation: Is Some Number Better Than No Number?*, 8 J. ECON. PERSP. 45 (1994). *See also* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2008) (arguing that voters are ignorant about many policies). *But see* Vanessa Williamson, *Public Ignorance or Elitist Jargon? Reconsidering Americans' Overestimates of Government Waste and Foreign Aid*, 47 AM. POL. RES. 152 (2019) (arguing that voters' "ignorance" of government policies is a result of the jargon employed by elites).

[201] *See supra* Section I.B.

through nontax means is needed to make up for the lack of redistribution through taxes, which results from the strongly-held view that taxation should reflect desert. But, since laypeople are not policy experts and do not need consistent, well-considered views across various domains of policy, they could feel strongly on the specific tax choice, strongly on the overall goal of equality of resources, and still indifferent about transportation spending—because they consider policy choices category-by-category rather than developing a comprehensive view. So, since separate public accounts do not need to be consistent, a political system that attended to category-specific lay views could still be imperfectly redistributive, if those category-specific views do not average out to the right amount of redistribution. And there is little reason to think that they would average out.

Again, this discussion is speculative. The Article makes a strong claim that there should be more redistribution through nontax means relative to an efficient baseline. The claim that there should be more redistribution through nontax means relative to current policy is weaker, but there is at least a plausible argument for it, on the basis of concern about inequality coupled with separate public accounts.

C. More Nontax Redistribution Causes Less Efficient Redistribution

There should be less nontax redistribution to the poor to the extent that the legislature itself will respond by reducing its redistribution through taxes. Part of the reason that there may not be more redistribution through taxes is that there is widespread "inefficient" in-kind redistribution. If cash is the first-best means of redistributing, then this effect would be perverse. In other words, political institutions could end up at a bad equilibrium of inefficient redistribution this way. One mechanism by which such a bad equilibrium could arise is that people are educated through policymaking[202] and, the less of one type of redistribution we have, the less they learn about it.[203] Or alternatively, voters come to expect less efficient in-kind redistribution. Finally and most basically, Congress may simply see more redistribution elsewhere and redistribute less through taxes.

The extent to which more in-kind redistribution causes less efficient redistribution is difficult to judge and is ultimately an empirical question. If the median voter theorem[204] is operative, and there's an amount of redistribution that is socially desired and is enacted through Congress, then any distributive change enacted through parties other than Congress should be undone. I am unaware of any evidence on the response by Congress to the distributional implications of regulatory policies.[205]

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[202] For example, congestion pricing schemes have sometimes faced opposition that then subsides after they are implemented. *See, e.g.*, John M. Quigley & Bjorn Harsman, *Political and Public Acceptability of Congestion: Ideology and Self-Interest*, 29 J. POL'Y ANALYSIS & MGMT. 854 (2010).

[203] The political process is often where policy views are adjudicated—and, indeed, often where they are formed in the first place. *See, e.g.*, Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

[204] ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

[205] While the repeal of several Obama Administration regulations, such as those limiting mandatory arbitration clauses, could be construed as a reaction to the distributional consequences of those regulations, I have not found any articles analyzing the issue from that perspective. Pub. L. No. 115-74, 131 Stat. 1243 (Nov. 1, 2017) (repealing Arbitration Agreements, 82 Fed. Reg. 137 (July 19, 2017)); *see also* Paul Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J. L. & PUB. POL'Y 505, 508-09 (2018).

One piece of evidence of more nontax redistribution *not* impacting taxes comes from court orders on education spending.[206] In half of the states, state supreme courts have mandated that legislatures spend more money on education in poor areas, leading to huge changes in spending priorities. If legislatures act as law and economics assumes, they would enact the population's desired amount of redistribution and, if that is disrupted, reequilibrate to the desired level. That is, if courts mandate that more resources go to the poor, then the legislature should enact other changes that disadvantage the poor. This does not happen, even 25 years after the court order. Taxes do not go up on the poor more than on the rich. No social programs that benefit the poor are discernibly cut. Though there are a variety of possible interpretations of this phenomenon, one is that voters do not view taxes and education spending as fully fungible. Each has its own distributive pie. Of course, this is just one example, and the empirical question is an open one.

D. Changing Views

Commonplace views change—sometimes dramatically. Nothing in the Article suggests that desert-based tax views are innate. On the one hand, if desert-based views dissipate in the future and taxes become more redistributive, policymakers could just change their policies to become more efficient and less redistributive, leaving the policy prescriptions developed thus far intact. On the other hand, if there is inertia in policymaking after desert-based views dissipate, then policy could end up in a combination of excessive and inefficient "second-best"[207] redistribution—a kind "kludgeocracy."[208] In this case, current policy should redistribute less.

When assessing this tradeoff between the benefits of redistribution today and the costs of kludgeocracy tomorrow, it is important to note two things. First, given standard discount rates, redistribution today matters a lot relative to hypothetical future policy. Even at an 8% annual discount rate, $1 in 10 years is worth only $0.45 now.[209] And second, we do not know in which direction policy views will head. Policy views could move toward or away from one-pieism. For example, over the last few decades, policy has in many ways moved away from the kind of cash provision suggested by economics and toward work requirements.[210] These two reasons militate

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[206] Liscow, *supra* note 132. *But see* Richard T. Boylan & Naci Mocan, *Intended and Unintended Consequences of Prison Reform*, 30 J. L. ECON. & ORG. 558 (2014) (showing evidence from a much smaller change—mandating more spending on prisoners—suggesting that social welfare spending was cut to pay for it).

[207] Lipsey & Lancaster, *supra* note 20.

[208] Steven M. Teles, *Kludgeocracy in America*, NAT'L AFF. (2013), https://www.nationalaffairs.com/publications/detail/kludgeocracy-in-america.

[209] Liscow, *supra* note 8, at 1665.

[210] Abigail Abrams, *Should You Have to Work to Get Medicaid? Some Red States Say Yes*, TIME (Mar. 29, 2019), https://time.com/5560758/medicaid-work-requirements/ (discussing the recent emergence of Medicaid work requirements); Diane K. Levy et al., *Work Requirements in Public Housing Authorities*, URBAN INSTITUTE (Jan. 2018), https://www.urban.org/sites/default/files/publication/95821/work-requirements-in-public-housing-authorities.pdf (describing the history and impact of the Department of Housing and Urban Development's Moving to Work (MTW) program); GENE FALK, CONG. RES. SERV., R44668, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY 3-4, 11-12 tbl.1 (2019), https://fas.org/sgp/crs/misc/R44668.pdf (discussing the increase in work requirements over time in the Aid to Families with Dependent Children and Temporary Assistance for Needy Families programs); Food & Nutrition Service, *A Short History of SNAP*, U.S. DEPT. AGRIC. (Sept. 11, 2018), https://www.fns.usda.gov/snap/short-history-snap (describing the history of Food Stamps, including work registration in 1970, job search requirements in 1977, Employment & Training programs in 1987, limitations on benefits for non-working able-bodied adults in 1996, and further investments in work in 2014).

in favor of doing the second-best redistribution today. Nevertheless, the risks of inertia in inefficient redistribution remain a consideration against second-best redistribution.

A further consideration is that the ability to adjust from a position of too much versus too little redistribution could be asymmetric. If reducing redistribution that is excessive is harder than increasing redistribution that is insufficient, then there should be less redistribution today. If the reverse is true, then there should be more redistribution.

E. The Contracting-Around Problem

For some policies, like transportation spending, the affected parties do not bear the costs of policies: if poor people receive more federal funding for transportation, they do not have to pay more. For other types of policies, affected parties may effectively bear the costs. Consider two such examples. First, the "implied warranty of habitability," which requires landlords to maintain rentals up to certain standards, may on its face seem to benefit the poor.[211] But, since such requirements may lead landlords to raise rent, low-income lessees may end up worse-off. Second, some regulations impact the prices that parties pay or the wages that they receive,[212] such as workplace regulations that could reduce demand for workers and lower their wages. Complex empirical questions are involved here. But, to the extent that higher prices or lower wages harm intended beneficiaries, the Article's argument about redistributing to them via nontax means does not apply. The stronger cases are where the government provides the funding or sets background legal rules, like those for torts, when parties are not themselves in a contractual relationship that allows price shifts to mitigate distributive gains.[213]

F. Plural Normative Goals

What normative goals policymakers should pursue is beyond the Article's scope. But, especially in light of what is arguably the large failure to enact the recommendations of the standard economics model, it is worth considering the impact of a richer set of values—including rights or fairness in either process or outcomes—on desirable redistributive policy. Consider the transportation spending example, and suppose that the analysis with standard normative values still suggests valuing the time of the rich more than that of the poor, spending more on the rich, and leaving the poor with considerably worse transportation options. One possible value is a process norm of treating a minute of the poor's time like a minute of the rich's time, which would suggest more equal treatment in the regulatory procedures.[214] Or, if equality of opportunity in getting to work is important, then more equal spending would be valuable. In either case, giving weight to these equality norms would further reinforce a movement toward treating the rich and the poor equally in regulatory cost-benefit analysis. Of course, these same equality norms could undermine a recommendation that values the poor more highly or spends

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[211] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072-73 (1970) (establishing the implied warranty of habitability).

[212] SUNSTEIN, *supra* note 8 (describing the "easy cases" for efficient policymaking).

[213] One significant exception to the concern that redistributive regulation of contractual relationships because of price changes will not benefit the intended party is when the price itself is regulated. For example, establishing a modest minimum wage (at least ignoring long-term effects) can shift resources from richer employers to poorer employees. Behavioral factors could also play a major role.

[214] *See* Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L. J. 279 (2015).

more on them. And the myriad other possible values—equality-oriented or otherwise—could impact the extent of desirable redistribution in both directions.

G. Endogenous Political Changes: Political Power and Legitimacy

A final factor is endogenous political changes. For example, poorer people with better transportation access may be more active politically—and perhaps vote more.[215] Whether having more politically active poorer people is a good thing depends in part on one's account of the political failing. For example, if poorer people were more politically active, perhaps tax policy would be more redistributive—and Congressional behavior would move closer to the first-best. Second, beyond standard economics goals, more politically active poorer populations may be intrinsically good.

Finally, redistributing in ways that are seen as legitimate, given how ordinary people think, could be itself good for a variety of reasons. One reason is that doing so could increase compliance with the law.[216] Another is potentially reducing the likelihood of a destructive populist backlash to elites inattentive to "ordinary people" that may interfere with the good functioning of the political system; among other problems, such a backlash could reduce investment in things like education that make larger numbers of people better off.[217] To the extent that this mechanism is operative, if ordinary people tend to support in-kind redistribution, then more redistribution should be in-kind. This factor would mitigate the impact of the second factor—on the possibility that more in-kind redistribution reduces more "efficient" redistribution—because the improved legibility of redistribution through in-kind means would have their own salutary effects, partially offsetting the "efficiency" costs measured in standard ways.

VI. ADDRESSING CRITIQUES

This Section briefly addresses three critiques not already considered as factors to include in deciding how much to redistribute to the poor.

Impossible to know the right distribution of resources

One objection is the difficulty of knowing what the right distribution of resources is. Defining such a distribution is beyond scope. However, uncertainty about the right distribution

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[215] Local officials and transit providers have raised and sought to mitigate concerns about transportation accessibility limiting voter turnout. *See, e.g.*, Luz Lazo, *Need a Ride to the Polls Tuesday? Here's Some Help*, WASH. POST: GRIDLOCK (Nov. 5, 2018) ("Transit services across the country are trying an unprecedented experiment to boost turnout Tuesday, waiving bus and rail fares and offering free and discounted bike, scooter and car trips."). *See also* Sam Sturgis, *Could Free Public Transit Get Americans to Voting Booths*?, CITYLAB (Nov. 3, 2014) https://www.citylab.com/transportation/2014/11/will-free-public-transit-get-americans-to-voting-booths/382199/.

[216] TOM TYLER, WHY PEOPLE OBEY THE LAW (2006).

[217] JAN-WERNER MULLER, WHAT IS POPULISM? (2016); J. Eric Oliver & Wendy M. Rahn, *Rise of the* Trumpenvolk*: Populism in the 2016 Election*, 667 ANNALS AM. ACADEMY POLITICAL & SOC. SCIENCE 189 (discussing President Trump as a populist); Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. & SOC. 12 (2018); Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harv. Kennedy Sch. Working Paper No. RWP16-026, 2016) (arguing that cultural backlash explains populism more than economic insecurity); Ana Swanson, *The Rise of Populism Shouldn't Have Surprised Anyone*, WASH. POST (Aug. 10, 2017) ("Countries, including the United States, have seen the rise of a populist backlash against more liberalized trade and international integration that could result in globalization playing out in reverse").

does not imply a default to the standard economic prescription of efficient economic policymaking that is inattentive to equity. Given the multi-step, multi-institution nature of representative democracies, we need a theory of politics to explain how redistribution happens. The median voter theorem, applied such that money is fungible across different forms of redistribution, is the view implicit in standard law and economics.[218] It suggests that the distribution we see is roughly the right distribution. Given widespread concern about inequality and the evidence in favor of desert inhering in pretax income, this view may be naïve.[219] At minimum, it is not obviously correct.

One way to view this Article is that it describes how to address redistribution within legal rules, *given a certain desire for redistribution*. If one is certain that the current distribution is fair, then—while the descriptive contribution in Sections I and II stand—the Article has little to contribute prescriptively today versus current policy. If, on the other hand, one believes that the distribution is not currently fair, this Article gives guidance on how to set policy under the theory of separate public accounts with desert-based taxation. Another way to understand the Article is that, if one is uncertain about what the right distribution of resources is, the tax public account gives a strong reason to think that the political system will not yield enough redistribution if it only redistributes through taxes and makes other policies efficient. Thus, we ought to redistribute at least some through nontax means, given the likelihood that taxes are inadequately redistributive.

Illegitimate to redistribute through administrative means

One may also argue that it is illegitimate to redistribute in ways that voters themselves do not appear to want. There are several responses. First, if the normative frame is the standard welfarist goal, this non-welfarist legitimacy critique may get no normative weight—at least not without a more complex story, such as a rule-utilitarian justification. But, second, taking on the claim directly, this critique misunderstands the Article. The theory of separate public accounts holds that a large number of ordinary people do not think of the appropriate amount of "redistribution" across all policies, as economic policy wonks do. Rather, they care about a variety of means—like transportation that can lead to equality of opportunity—and processes—like taxes, where people "deserve" to keep some of their income. The fact that Congress does not redistribute enough to achieve distributive justice through taxes alone does not imply that people are opposed to, say, valuing the rich and the poor equally in transportation cost-benefit analysis and, thus, spending more on the poor *relative to the efficient baseline*. Taxes and transportation are different means, each with possibly different distributive views. Congress has not dictated to the Department of Transportation how to allocate the funds between the rich and the poor.[220] And it is not at all clear that voters or Congresspeople want to value the time of the rich more than the time of the poor.

Institutional capacity

A related critique is that it is beyond the institutional capacity of actors like regulators to decide distributional questions. Acknowledged, distributional questions are contentious and

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[218] *See supra* note 204 & surrounding text.

[219] Of course, there are many other views of politics as well, such as James Buchanan's "leviathan" view of government that it seeks to maximize revenue. GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX: ANALYTICAL FOUNDATION OF A FISCAL CONSTITUTION (1980).

[220] *See* Value of Time Travel Savings, *supra* note 27.

normative. But, as the transportation example shows, efficient allocations themselves have major distributional implications, and shifting those policies may or may not significantly strain institutional capacities. For example, simply applying a list of distributive weights may not be difficult at all. Alternatively, treating everyone equally, rather than having different values for different modes of transportation based on different incomes, seems to make the job easier, not harder.

CONCLUSION

Inequality is a defining issue of our time. Unfortunately, the standard policy prescriptions among the economic policy elite depend upon empirical assumptions that are deeply at odds with social reality. The result of the twin prescriptions of efficient nontax policy that ignores distributive concerns and highly redistributive tax policy has been deeply inegalitarian, with skyrocketing inequality.

The theory of separate public accounts explains that the central flaw of the standard prescription is the assumption that ordinary people and thus their elected officials essentially ignore the means through which redistribution happens. In contrast to standard assumptions, ordinary views about taxation—the redistributive lynchpin—likely deeply conflict with the redistribution needed to make the standard prescription work. Instead, it is commonsense that desert inheres in pretax income: the rich deserve to keep a decent share of their money, and the poor typically do not deserve large cash transfers. This view means that taxes will not redistribute enough and thus that the economics heuristic that nontax policy should be efficient is not useful, since it dooms us to perpetual inequality.

Instead, to address alarm about inequality, we need widespread equitable policymaking. The standard economic policy prescription puts a distributive straightjacket around all policy outside of the income tax. Policymakers should take the straightjacket off.

None of this is to say that the concerns underlying economics no longer matter—far from it. Policymakers should do as much good as they can within the resource constraints that they face—for example, by adopting a thousand points of equity approach. Economics can help navigate—but without one narrow assumption about what taxes Congress will enact.

Something has not worked very well with the standard expertise for the past few decades, yielding neither robust economic growth[221] nor greater economic equality[222] nor greater trust in government policy.[223] Populist revolts around the world put economic policy up for grabs. It may be time to try something a little different.

The future of economic policymaking and analysis then is one of wide frontiers, with skepticism about any one totalizing approach, conflict between competing values, debate over the right distribution of income, questions about institutional competencies, and uncertainty about the knock-on effects of adopting a given policy on policymaking elsewhere. But that's

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[221] The causes of reduced growth are myriad, *see, e.g.*, Robert Gordon, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR 7-8 (2016) (arguing that "the pace of innovation since 1970 has not been as broad or as deep as that spurred by the innovations" of the century before), and the contribution of economic policy is unclear.

[222] Piketty & Saez, *supra* note 107. *But see* STEVEN PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS (2018) (arguing that, in many ways, outcomes in the world are improving).

[223] Uri Friedman, *Trust is Collapsing in America*, ATLANTIC (Jan. 21, 2018), https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964.

democracy. And the policies that our democracy deserves are not those generated by a blindered benevolent dictator, but rather those that embrace the richness of our collective ordering.

Appendix – Model of Regulatory Cost-Benefit Analysis for Transportation Spending

Consider a new presidential Administration conducting regulatory cost-benefit analysis for transportation spending to allocate funding between the rich and the poor. This Appendix model shows concretely how the Administration can incorporate both a concern for distributional outcomes as well as a distaste for addressing the issue through the particular *means* of cash taxes and transfers, using a standard welfarist framework. In other words, rather than treating income net of taxes and transfers as the same thing as the outcome, taxes should be treated as one among many possible means of redistribution. This is a way of reconciling a distaste for using taxes and transfers to redistribute because of desert-based beliefs with widespread concern about economic inequality. At the same time, the model allows for *tradeoffs*: in particular, the declining marginal utility of income driving redistribution to the poor versus the relatively low and diminishing returns to investment in infrastructure for the poor.

Four main insights come from the model. First, the model shows a concrete framework for how policymakers can *think conceptually and practically* about distributive questions given the reality of political constraints. Second, under the theory of separate accounts, the Department of Transportation's current policy is mistaken. Desert-based tax views lower redistribution through that means, but people still care about inequality. The Department of Transportation errs in not equalizing its transportation spending to help reduce inequality. And the welfare impacts of erroneously spending only the "efficient" amount on the poor can be large. Third, one can remain agnostic on whether considering desert in taxation is normatively correct. The transportation planner's right choice is unaffected. And fourth, even in the face of normative uncertainty, regulators should often still act to help the poor.

A. Model Setup

Consider two representative economic agents of the rich and poor are indexed by r and p. Each chooses to supply L_i units (e.g., hours per year) of labor, paid at fixed wages w_r for the rich and w_p for the poor.

The government has a flat tax τ with which it funds government spending. Government revenue can be used for three things: a cash transfer to the poor (s), transportation spending for the rich like runways at airports (T_r), or transportation spending for the poor like buses (T_p). The revenue constraints binding the social planner are thus given by

$$R = w_r L_r \tau + w_p L_p \tau$$

$$R \geq T_r + T_p + s$$

Each of the poor and the rich receives utility from income after taxes, but also experiences disutility from providing labor. The individuals spend H_i units of time (e.g., hours per year) commuting to work, an activity that also detracts from utility. Additionally, the poor can receive a cash transfer s ($s \geq 0$). In a standard but heroic assumption, these preferences are represented with log utility functions (as is used for cost-benefit analysis in the UK)[224] with a declining marginal utility of income given by[225]

$$U_r = \log\left(w_r L_r(1-\tau) - \frac{1}{k+1}(L_r + H_r)^{k+1}\right) \quad (1)$$

$$U_p = \log\left(w_p L_p(1-\tau) + s - \frac{1}{k+1}\left(L_p + H_p\right)^{k+1}\right) \quad (2)$$

Here, k is the inverse of the labor supply elasticity. The first term, $w_i L_i(1-\tau)$, plus s for the poor, is post-tax-and-transfer income. The second term, $\frac{1}{k+1}(L_i + H_i)^{k+1}$, is the disutility from supplying labor and commuting to work. The effect of taxes on labor supply is what generates the distortion to efficiency in the model.

Transportation spending separately reduces each party's commuting time, allowing more time working. As transportation spending increases, the rich and poor face the same declining marginal reduction in commuting time. In particular, H_i is a convex function of the level of government spending T_i on transportation services for each group. Specifically,

$$H_i = \alpha\frac{T_i^2}{2} + T_i z + Q \quad (3)$$

where $\alpha > 0$, $z < 0$, $Q > 0$, which yields a linear marginal impact of T on H. As a result, some transportation investments that save a lot of time at little cost are available to each of the rich and the poor, and then costs increase.

T_i, τ, and s are and chosen to maximize one of two welfare functions. The first, "standard" one is

$$W = U_r + U_p \quad (4)$$

The second represents in a simplified way the possibility that many people may have a distaste for redistributing through cash by adding to equations (1) and (2) a preference that the poor not receive transfers without working for them. A distaste parameter λ, shared by both the rich and poor, on the transfer s (with $\lambda > 0$) expresses this preference. Thus, the social welfare function becomes:

$$W = (U_r - \lambda s) + \left(U_p - \lambda s\right) \quad (5)$$

There are three primary policy regimes: First, in the "standard" model (model A), one social planner optimizes equation (4), without distaste for cash transfers, subject to the revenue constraint (representing box 2 in Table 1).

Second, in model B, Congress first chooses s and the transportation budget ($T_r + T_p$) to optimize equation (5), anticipating that the Department of Transportation will also optimize equation (5). As is common in real policymaking, although Congress precisely specifies the distributional impacts of tax policy,[226] it leaves considerable discretion to the executive branch

[224] HM Treasury, *The Green Book: Appraisal and Evaluation in Central Government*, GOV.UK (Mar. 19, 2019).
[225] *See*, *e.g.,* Emmanuel Saez, *Using Elasticities to Derive Optimal Income Tax Rates,* 68 REV. ECON. STUD. 222 (2001).
[226] *See supra* note 186 & surrounding text.

for the distributional impacts of regulatory and expenditure policy.[227] Being politically attentive, the Department of Transportation then does in fact optimize equation (5) in dividing the spending between T_r and T_p. This roughly represents box 4 in Table 1 (the thousand points of equity approach).

Third, in model C, Congress does the same thing as in model B. However, being naïve, the Department of Transportation still does what it does in reality: transportation planners choose the efficient allocation of spending that maximizes income. This roughly represents box 1 in Table 1 (the status quo approach).

In all cases, welfare is given by equation (4), the standard welfare function. That is, model (5) is just the "decision utility" reflecting what the government does. However, note that, since the Department of Transportation has no control over s, λs falls out of its decisionmaking. Thus, it optimally chooses the same allocation whether equation (4) or equation (5) provides the correct welfare function.

To reflect current practice, the illustrative calibration uses the current wage parameters $w_p = 25$ and $w_r = 63$. It also uses $k = 1.075$, $\alpha = 0.00013$, $z = -0.05$, $Q = 10$, and $\lambda = 0.001$.

B. Main Results

Table 3 presents results of the calibration. In addition to providing the allocations of cash and transportation funding, it also includes the "distributive weights," or the relative contribution to social welfare of a dollar in the hands of a given person. The question that matters for the transportation spender is not the distributive weight in the abstract—that is, not for an omniscient social planner pulling all levers of policy. Rather, what matters for the Department of Transportation is the distributive weight after Congress has redistributed through cash transfers, which is what is shown.

Model A provides a very large cash transfer to the poor that is roughly in line with the demogrant suggested in the existing economics literature. However, it provides far more spending on the rich than the poor on transportation that is roughly in line with current practice of choosing spending to maximize income, supposing that all time savings result in hours worked. It has roughly the efficient distributional weights: weigh the rich and poor equally.

Model B, with desert-based tax views, significantly redistricts the cash transfer to an amount that is roughly in line with reality. The result is that transportation planners who are politically attentive to what taxes look like spend roughly the same amount on the rich and poor, though—indeed, actually a little more on the poor than on the rich. And a dollar of spending for the poor is weighed about three times as high for the poor as the rich.

In model C, with desert-based tax views but transportation regulators who are naïve and continue maximizing efficiency despite the low cash transfers to the poor, continue spending far more on transportation for the rich than for the poor because they are counting a dollar in the hands of the rich and poor equally for welfare purposes.

We can then measure the welfare impact of adopting the transportation spending of model C instead of model B. Welfare impacts are measured in two steps: First, calculate the welfare under models B and C. Second, calculate the amount of money that one must take away from the rich under model B to lower welfare to its model C level. And then divide that amount

[227] *See supra* note 190 & surrounding text.

by the total income that parties earn when in model B. Again, for this exercise, it does not matter whether equation (4) or (5) represents the true welfare because the social value of a dollar in the hands of the rich is not impacted by the presence of λ.

The welfare loss is large for just one policy: 4.5%. The welfare loss arises because there is not enough spending on the poor when cash transfers redistribute little. Multiplying the impact across even a handful of policies would quickly yield very large shares of welfare. Thus, current Department of Transportation policy is erroneous because it is inattentive to Congress's actions on cash transfers. The poor receive too little cash from Congress and too little transportation assistance from the Department of Transportation. Thus, current policy reduces social welfare because of the high social value of the income the poor earn from being able to commute to work more quickly.

Table 3: Annual Transportation Spending and Cash Transfer Under Three Models

	Transportation spending	Cash transfer to the poor	Distributive weight to transportation planner, poor : rich	
Model A: Standard model	Poor: $2,692 Rich: $7,053	$12,312	1:1	
Model B: Desert-based view on cash transfers and politically attentive regulators	Poor: $7,304 Rich: $6,832	$4,346	3:1	
Model C: Political constraints with naïve efficient regulator	Poor: $4,307 Rich: $9,829	$4,346	1:1	Welfare cost of adopting efficient transportation spending: 4.5% of income

C. Model Extension: Uncertain Normative Goal

Thus far, the model has assumed that we know the social value of redistribution. A separate question considers which policies to adopt under uncertainty about the appropriate normative model—not in the sense of whether cash transfers are particularly normatively costly (which does not matter for the transportation planner), but rather the right amount of overall redistribution. This question leads to an error cost analysis like that described in Section V.A.

Suppose for simplicity that there are two possibly correct social values of redistribution. The first is model B, in which Congress does not redistribute as much through taxes because of a distaste for redistributing through cash in particular and the Department of Transportation optimally responds.

The second model (model D) adds a new parameter, F, which discounts the utility of the poor, such that the social welfare function is

$$W = U_r + F \cdot U_p \tag{6}$$

where $0 < F < 1$. F is calibrated to generate the same optimal s as model B produces. It thus captures an alternate explanation for low cash transfers other than a disutility of cash transfers (i.e., $\lambda > 0$): distaste for the utility of the poor itself.

Consider the error costs under both models. If model B is accurate but the Department of Transportation adopts model D's prescription, transportation spending is insufficiently redistributive and there is a welfare loss of 3.6%. (Recall that this is the case whether the dispreference for cash transfers is either normatively correct or merely a political constraint, as described in the previous subsection.) If model D is normatively right (i.e., there is just a weak preference for redistributing), but regulators adopt the more redistributive transportation spending of model B, then there is also a welfare loss, though a smaller one: of 2.1%.

In principle, regulators could compare the error costs in any given situation to help with their decision-making: the larger the welfare cost of adopting the wrong policy, the more consideration that normative framework should get. Suppose, for example, that there is a 50% chance of each possibility being correct. The resulting optimal spending is $5,773 on the poor and $7,025 on the rich. This resulting ratio of spending on the rich and poor is between the two extremes, though closer to the model B outcome because the welfare costs of deviating from it are larger than the welfare costs of deviating from model D.

This illustration again reflects the rule in economics that the marginal cost of deviating from the optimal policy increases in the size of the deviation.[228] That is, being a little off from the optimal outcome for either model B or model D is not very costly: the transportation planner is close to indifferent for the marginal transportation cent. Only when spending deviates further from the optimal amount do the marginal costs get large.

[228] *See* Section IV.C.2.