Democratic Law and Economics

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ABSTRACT: Law and economics typically analyzes ideal policies, ignoring real-world democratic institutions and constraints. It is helpful for real-world political actors, though, to have guidance for the real world, which this Article provides for policymakers setting policy with distributional impacts. Current guidance not considering real-world constraints may significantly hamper policymakers' effectiveness at addressing today's crisis of inequality. Critique of law and economics is widespread, but, to provide an alternative framework for policymaking, one needs to start with an account of its failures that can provide such an alternative framework. This Article provides such an account of the failures and an alternative framework.

This Article explores a major dissonance between expert and lay policy views: the set of *tax* prescriptions required by law and economics is sharply at odds with ordinary citizens' psychology about taxes. While standard economic reasoning views taxes solely as a system of incentives and redistribution, many ordinary people also think of taxes as rewarding *desert*—as recent rigorous survey experiments, advances in the economics of taxation, and decades of experience show. Desert-based tax views limit redistribution, since the poor are deemed to not deserve free cash and the rich are deemed to deserve some of their income. A democracy where Congress is attentive to such tax views will need to look elsewhere to achieve distributive justice.

The Article turns law and economics prescriptions on their heads. Rather than never redistributing, as standard law and economics prescribes, legal rules typically *should* redistribute: where politically feasible, decentralized political actors should typically each tilt policies modestly 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 describes the issues and points the way forward for policymakers who care about addressing inequality and minimizing costs, using an illustration of federal regulatory cost-benefit analysis and also describing implications in other areas.

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Introduction

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.[1] 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, despite the essential

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[1] 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).

need of the poor to get to work to achieve economic mobility. How could it possibly be that baked into our policies is a method that spends on the well-to-do instead of the needy at a time of such great concern over inequality,[2] especially in light of evidence on the importance of transportation for economic mobility?[3]

This practice is actually the logical prescription of a dominant paradigm for economic policy: the pursuit of economic "efficiency."[4] The basic logic is that the economic pie grows more when rich people work more than when poor people work more because the rich have higher wages. By allowing the rich to work another hour instead of the poor, we maximize the size of the economic pie. The gains can then be partly redistributed through cash "taxes and transfers" to make everyone better off than they would have been had we saved an hour of the poor's time instead. Yes, assuming the poor can get to work at all, they will work less because they must spend another hour in transit. But, because the rich get more transportation spending, they work and earn more, and can thus give larger cash transfers to the poor. Everyone is better off. This thinking is so standard among economic policy elites across the country that it has been called the "Brookings religion."[5]

This Article argues that this standard efficiency logic is incomplete and problematic because it erroneously acts as if addressing distribution through cash and through transportation funding are interchangeable. It is inattentive to the *means* of achieving a just distribution and instead attentive only to the desired *outcome*. It acts as if there is only one economic pie to be distributed, while in fact—as the Article will explain—there are many separate economic pies in the eyes of much of the population. As a result, this logic may often yield bad policy. Instead, in examples like this, we should fund transportation for the poor considerably more than this example suggests. And we should do so based not on an external critique of law and economics[6] but rather based on the ultimate goal typically underlying economics: maximizing aggregate well-being.

The problem described here with the standard efficiency approach for achieving this goal of maximizing well-being is that it ignores how our real-world institutions and politics function due to voters' political and social psychology. It has been noted by critics of economics that the cash taxes and transfers needed to compensate for getting less transportation spending, for

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[2] *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). Republicans, too, 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* Catherine Rampell, *Republicans Have Started to Care About Income Inequality*, WASH. POST (Jan. 22, 2015).

[3] 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").

[4] Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) [hereinafter *Redistributing Income*]; LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2009).

[5] Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1651 (2018).

[6] *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).

example, often never arrive.[7] But, why not? And what should we do about it? This Article gives a specific account based on widespread lay views about taxation, providing foundations for such political considerations in policy design.

The account first requires some understanding of standard law and economics's esoteric underbelly: "optimal tax theory," which prescribes a set of taxes and transfers to achieve a fair distribution of income. The key point is that taxes are assumed to dissolve all individuals into producers of one pool of resources to be redistributed. There is no sense of "desert," or people being entitled to a larger or smaller share of resources based on what they themselves earn, beyond the incentives to increase the size of the pie. The Article develops a maintained hypothesis about commonplace social and political psychology: Contrary to the standard assumptions underlying economics, but consistent with common social psychology, a belief in desert is commonplace. That is, those who earn or save money deserve to keep some of it, and those who do not earn or save money deserve less. Such views may tap into people's notions of reciprocity: recipients have to give to get.[8] They have to work to get the economic benefits. And, since not a benevolent dictator but rather Congresspeople selected by voters set tax rates, taxes do not redistribute as much as is needed to achieve distributive fairness.

The Article hypothesizes that many ordinary citizens have this view about taxation because they have compartmentalized policy-specific views about distribution that the Article calls "mental policy accounts" in reference to the large literature in economics documenting how individuals have "mental accounts," especially in the area of savings. That is, although economics typically assumes that funds are fully fungible across different sources of income—regular paychecks, dividends, windfalls increases in the value of stocks, etc.—individuals treat them in very different ways. For both savings and policy views on redistribution, people follow prudent rules of thumb for each account. As a result, resisting redistribution through taxation is completely consistent with supporting it through other means, such in-kind necessities like housing, healthcare, and education.[9] People could think this way for many reasons, including limited time and analytical capabilities. Whatever the reason, emerging evidence from carefully-designed survey experiments in economics,[10] as well as decades of experience,[11] suggest that voters are more willing to give in-kind transfers (like bus service) that improve equality of opportunity—the ability to get to work—than to give out cash.

Being aimed at changing how the economic policy elite makes its decisions, the Article adopts standard economics normative goals and shows the major implications—even under those goals—of *political constraints* driven by the tax mental policy account.[12] Critiques of law and

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[7] Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2015); Markovits, *supra*.

[8] SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE (2013).

[9] This policy-specific view is often called "specific egalitarianism." *See* James Tobin, *On Limiting the Domain of Inequality*, 13 J.L. & ECON. 263 (1970).

[10] SHEFFRIN, *supra* note 8; Jimmy Charite et al., *Reference Points and Redistributive Preferences: Experiment Evidence* (Nat'l Bureau of Econ. Research, Working Paper No. 21009, 2016); Raymond Fisman et al., *Do Americans Want to Tax Capital? Evidence from Online Surveys*, (Wash. Ctr. Equitable Growth Working Paper, 2017); Matthew C. Weinzierl, *A Welfarist Role for Nonwelfarist Rules: An Example with Envy* (Harv. Bus. Sch., Working Paper No. 17-021, 2017); Matthew C. Weinzierl, *The Promise of Positive Optimal Taxation: Normative Diversity and a Role for Equal Sacrifice*, 118 J. PUB. ECON. 128 (2014); 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) [hereinafter "Weinzierl, *Popular Acceptance*"].

[11] *See infra* Section II.

[12] This Article thus represents a "second-best" approach. Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

economics abound.[13] But to be constructive in a law and economics that considers real-world institutions, we need an account of politics that says that there is something special about taxation—that it is still socially desirable to reduce economic inequality, but that there's something peculiar about economists' chosen tool for addressing it. The maintained hypothesis provides such an account.

The Article illustrates its argument with an extended example on the Department of Transportation's allocation of transportation spending between the rich and the poor with which the Article began.[14] The Article suggests that current policy is wrong because of constraints on Congress's redistributionary taxation. The illustration shows four things. First, it shows how a regulator (or other party) could consider political constraints. By considering views on taxes as views on *just one means* of redistribution, rather than on views of redistribution writ large, as is typically done, the illustration shows how regulators can calibrate the appropriate distributive response to taxation. Second, the welfare losses from regulators being inattentive to political constraints can be large. Although the transportation example is just illustrative, it is supported by cutting-edge research in economics that shows just how little taxation redistributes relative to sensible baselines.[15] Third, the regulator does not need to take a stand on whether the views about taxes are normatively correct or not. One can remain agnostic on that question; all that matters is that, in fact, despite a desire to have more equal economic outcomes, taxes do not achieve the redistribution needed. Fourth, regulators do not need to be certain that redistribution is inadequate to act. All they need is a belief that there is *some probability* that redistribution is inadequate.

Overall, many ordinary people do not view the government as one big allocational mechanism with perfect fungibility between policies. Department of Transportation policymakers should think carefully before acting like they do. Such a critique is especially important at the moment given the widespread populist anger at elites.

The Article reassesses economic policymaking in light of the combination of desert-based views about taxation, mental policy accounts, and real-world institutions. The policy implications are far-reaching. Indeed, they flip law and economics on its head: from a claim that nontax policies should *never* redistribute to a claim that, where politically feasible, they should *typically* redistribute. If the tax policy needed to achieve just distributive results conflicts with desert-based views about the process of taxation, then it is worth redistributing in the panoply of *nontax* policies that could be used to address redistribution: healthcare spending, childcare provision, regulatory cost-benefit analysis, and so on. In other words, if tax policy durably reflects desert-based views, then policymakers should use other legal rules to pick up the redistributive slack. Given widespread views about fairness in nontax policy, there should be many politically feasible areas. The Article also discusses several other considerations that surface when economic policy is viewed in these terms, which affect the desirability and feasibility of such redistribution.

Ultimately, the Article suggests a three-part hierarchy of responses to desert-based views about taxes if the standard normative goal in economics is correct. First, advocate: Continue making the case of the value of tradeoffs across policies, the value of cash, and the nonexistence of desert. Second, approximate: Some policies 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.[16] The

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[13] *See supra* notes 6-7.

[14] *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018).

[15] Nathaniel Hendren, *Efficient Welfare Weights* (draft, March 2019).

[16] *See* Jacob Goldstein, *How The Poor, The Middle Class And The Rich Spend Their Money,* NPR (August 1, 2012),

Article also considers implications for "tax expenditures" generally. Third, tilt policies toward the worse-off: Adopting a "thousand points of redistribution" strategy across the myriad nontax policies, policies should become modestly more redistributive where politically feasible. But doing a little bit in a lot of places is better than doing a lot in a few places because the marginal cost of tilting toward the poor increases as the tilt increases.

Before moving on, several things should be made clear. First, this Article adopts the standard "utilitarian" or "welfarist" perspective of economics. Second, the Article does not claim that it is easy to discern common views about taxation or other policies. Rather the claim is that there is a strong case that common views about taxation are at odds with standard assumptions in law and economics, using a host of evidence, including survey experiments and existing institutions. Third, the goal here is not to supplant politicians but rather to improve the policy advice given to them.

The Article relates to several literatures. One is the political science literature on "predistribution," which argues for using the government to equalize pre-tax resources rather than tax-based "redistribution."[17] This Article describes an account of why predistribution is good policy and works out the policy implications in an economics framework. Second, the Article contributes to the literature on optimal economic policy under political constraints.[18] This Article works out the implications of a specific explanation of political constraints in the context of the choice between taxes and legal rules across different institutions of the state. A third related literature is on legitimacy, or governing in a way accepted as right and proper.[19] Though working from the standard frame of economics, the Article can also be understood to describe how to redistribute in a legitimate way, given the commonplace views of citizens. Fourth, the Article relates to a movement among liberal economists to argue for more government intervention largely on efficiency grounds.[20] While that literature attempts to identify win-win policy reforms that simultaneously improve efficiency and reduce inequality, this Article provides a framework rooted in commonplace psychology that identifies policies to increase redistribution. Fifth, the Article relates to work on building support for redistribution through, for example, advertising program benefits or universalist designs of programs, notwithstanding potential efficiency costs.[21]

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").

[17] Jacob S. Hacker, *The Institutional Foundations of Middle Class Democracy*, POLICY 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) .

[18] 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); Alberto Bisin, Alessandro Lizzeri & Lefeat Yariv, *Government Policy with Time Inconsistent Voters,* 105 AM. ECON. REV. 1711 (2015) (developing a model that suggests that balanced budget rules could constrain government over-responsiveness to citizen caprice); Marina Halac & Pierre Yared, *Fiscal Rules and Discretion under Persistent Shocks*, 82 ECONOMETRICA 1557 (2014) (studying optimal policymaker discretion in light of time-inconsistent preferences and persistent shocks).

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

[20] DEAN BAKER, THE END OF LOSER LIBERALISM: MAKING MARKETS PROGRESSIVE (2011); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012); Economists for Inclusive Prosperity, https://econfip.org/.

[21] *See* Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313, 318 (2011) (describing "how policies can shape political preferences about redistribution"); Suzanne Mettler, *Reconstituting the Submerged State: The Challenges of Social Policy Reform in the*

This Article does not offer guidance on how to build support for redistribution, but instead takes voters' views as given and describes how policymakers should respond to them.

The Article's contribution—combining behavioral economics, the reality of politics and institutions, basic law and economics tenets, and distributive questions—is thus threefold. First, it makes the *empirical* case that commonplace views about taxes are deeply at odds with standard assumptions in law and economics for a somewhat obscure, but key reason: desert in taxation can have no place under standard assumptions, but we have many reasons to think that such reasoning is pervasive. As a result, Congress will tend to redistribute less through taxes. Second, the Article proposes a transformative, decentralized, but low-cost way of helping the poor: where politically feasible, policymakers actors across the country should modestly tilt legal rules and economic policies toward the poor. The Article explains how much tilt there should be, given a desire to both help the poor and minimize costs, and addresses a host of other concerns. Third, the Article points the way toward a more complete version of law and economics analysis that is "democratic" not in the sense of being more majoritarian but rather in the sense of taking into account real-world democratic institutions and the nonexpert views that influence how those institutions act.

The Article proceeds as follows. Section I describes the standard view of the way to address distribution in law and economics: "optimally" redistributive taxes and efficient nontax legal rules. Section II develops the maintained hypothesis on commonplace social and political psychology: many people have mental policy accounts, with desert-based views about taxes and often views about nontax policies involving distributions that are more equal than is efficient. Section III adopts the perspective that these commonplace views cause political constraints and applies standard economic analysis to a particular illustrative institution: regulatory cost-benefit analysis of transportation spending. Section IV considers other factors in the analysis and discusses general policy implications. Section V addresses critiques. Section VI suggests other applications.

I.   The Standard View in Law and Economics: "One-Pieism"

The Article takes the standard economic perspective that the ultimate aim is maximizing welfare. This "welfarist" or "utilitarian" perspective estimates each individual's subjective well-being and aggregates.[22] The goal is to recommend the set of welfare-maximizing policies that is best for society among all possible combinations of policies.[23] This Article describes how to better accomplish this goal. This Section describes how a welfare-maximization analysis is typically conducted in law and economics now.

The standard approach to the analysis 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

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Obama Era, 8 PERSP. ON POL. 803 (2010) (advocating for advertising or otherwise making known to taxpayers the programs they pay into and benefit from to increase public support for them); Yair Listokin & David M. Schizer, *I Like to Pay Taxes: Taxpayer Support for Government Spending and the Efficiency of the Tax System,* 66 TAX L. REV. 179 (2012) (similar).

[22] *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 117-22, 817-50 (1995).

[23] N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 145 (7th ed. 2015); *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").

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

The one-pieist argument proceeds in two steps—first, efficient nontax policies, and second, "optimal" taxes. Efficient nontax policies are those that maximize individuals' willingness to pay given the existing distribution of wealth.[25] When measuring efficiency, all that matters is each individual's willingness to pay to avoid harm and bring benefits to herself, and then the appropriate amount of public good is provided or penalty is enacted. The analysis typically embeds the idea that notions of "fairness" in means do not matter.[26] 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.[27]

There are still many *efficiency* reasons for the government to provide nontax benefits. For example, there is a public goods justification to provide parks, even in poor neighborhoods.[28] Information problems in insurance markets can justify a significant role for the government in healthcare provision.[29] 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.[30] One can spin myriad arguments. But they all have one thing in common: the reason for providing noncash benefits is efficiency.

In contrast, deviating from the all-cash logic in the name of "fairness" of means would lead to Pareto failures.[31] Suppose people are deemed to have a "right" to healthcare or a clean environment. If recipients value healthcare or a better environment at less than the equivalent cash transfer, the government can make everyone better off by taking the money allocated to healthcare benefits or environmental improvement and providing it as cash instead.[32] The essential logic

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[24] Kaplow & Shavell, *Redistributing Income*, *supra* note 4. 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] *See* Liscow, *Is Efficiency Biased?*, *supra* note 14, at 1652.

[26] Of course, there are exceptions. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy*, 2 AM. L. & ECON. REV. 223 (2000).

[27] *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).

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

[29] *Id.*

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

[31] KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 4; Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281 (2001).

[32] 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 & n.7 (2013) (collecting citations); Chris Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View,* 29 J. LEGAL STUD. 797, 805-06 (2000); *see also* Chris Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001).

behind using taxes and transfers, rather than in-kind benefits, regulation, or other nontax policies, is that, if rational people are willing to pay for something (and markets are working well), then they can buy it themselves with cash. For example, individuals can buy health insurance or rent an apartment in an area with good environmental quality if they want to. To help the poor through in-kind benefits on fairness grounds is inefficient because they might value the cash more, since they might prefer to spend it on other things. Instead, nontax policies should be efficient, and cash taxes and transfers should typically bear the redistributive burden. Thus, cost-benefit analysis should allocate more pollution to poorer people because they are willing to pay less for environmental health. There should be no social spending (e.g. on healthcare) or regulations aimed at helping out poor people for non-efficiency reasons. And so on. In short, one-pieism leaves little room for law to address inequality—unless it's just an incident to increasing 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.

After those efficient nontax policies, the second step is then to take the economic pie and divide it up equitably through taxes and transfers. This *overall distribution* of the economic pie is the one place where lay views are sometimes taken to matter.[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. The prescriptive element of "efficient nontax policies" depends upon these taxes and transfers happening.[35] The standard story thus requires "one pie" in that the political process in fact treats distribution through various means the same way. Whether the pie consists of government-provided child care or taxes and transfers or guaranteed environmental quality, policy will ultimately arrive at the same distributional outcome, so that it makes sense to maximize the size of the pie before dividing it up.

The modern theory of optimal taxation dates to the 1970s.[36] It has played an important role in the development of modern law and economics.[37] But, though the basic logic is old, it was not until more recently—in the 2000s—that optimal tax economists started producing specific, empirically-based estimates using observed behavior that suggested the amount of redistribution necessary to maximize welfare.[38] Economists have now extensively studied the tax rates required to achieve a utility-maximizing distribution of income, given the behavioral response to taxation,[39] though this optimal taxation literature has received little notice in the legal literature outside of tax

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[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.

[34] KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 4 at 24-27.

[35] Liscow, *Is Efficiency Biased?*, *supra* note 14, at 1664; Fennell & McAdams, *supra* note 7.

[36] 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).

[37] Kaplow & Shavell, *Redistributing Income, supra* note 4.

[38] Emmanuel Saez, *Using Elasticities to Derive Optimal Income Tax Rates,* 68 REV. ECON. STUD. 205 (2001). Economists also produced earlier estimates, but they were considerably less reliable because they were less based on observed behavior.

[39] N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSP. 147 (2009) (summarizing the literature); Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. ECON PERSP. 165 (2011) (disagreeing with some aspects of Mankiw, Weinzierl & Yagan, but establishing many points of consensus).

scholars themselves.[40] 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 law and economics.

Redistribution is driven by the poor's higher marginal utility of consumption. But 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. A key aspect of the "optimal" tax is that only two factors determine it: people care about their own income, and society values redistributing income toward the poor. Of course, there is no exact agreement on what an "optimal" utilitarian income tax would look like.[41] However, there is broad agreement on several features.[42]

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.[43] 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.[44] Most recently, a sophisticated estimation by economist Emmanuel Saez recommends a demogrant of $11,900 (in 2018 dollars).[45]

Second, the demogrant is taxed away at fairly high marginal tax rates for moderate income-earners (very roughly those earning around median income). For example, Saez's model has 37% marginal tax rates on such incomes.[46] 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.[47] 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.

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[40] 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).

[41] *See*, for example, the debate between Mankiw, Weinzierl, and Yagan on one side and Diamond and Saez on the other. Mankiw, Weinzierl, & Yagan*, supra* note 39 at 155-59; Diamond & Saez*, supra* note 39 at 175-77.

[42] *Id.* Important, the features here are on taxes on labor, but not capital, income. The traditional view has been to have low, possibly even zero, tax rates on capital income. Mankiw, Weinzierl, & Yagan*, supra* note 39. But that view is under some flux. Diamond & Saez*, supra* note 39. 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.

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

[44] 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).

[45] Saez, *supra* note 43 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). 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.

[46] Saez, *supra* note 43, at 1061.

[47] 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.

Third, optimal tax theory says that, as inequality increases, taxes should become more redistributive.[48] That is, as the share of income earned by those with the highest incomes goes up, their tax rates should go up.[49] This makes sense: as the rich get richer, their marginal utility of consumption declines yet more, making it worth taxing them more.

And, fourth, fixed attributes of people should be "tagged"[50] to observable characteristics correlated with earnings ability.[51] 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.[52] 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 provides no disincentive to work—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.

The result of this two-step is what I call "one-pieism:" the idea that 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 have an efficient level of benefits to individuals while achieving a fair ex post distribution of dollars among those individuals. In other words, it is the idea that 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 next Section shows how such a view seems to conflict with commonly-held lay views.

II.   Common Views About Distributive Problems

This Section develops a maintained hypothesis about the commonplace social and political psychology of voters. By "maintained hypothesis," I mean that there is considerable evidence to believe that this is a good description of the world, but the case is hardly airtight. This maintained hypothesis is that, in contrast to the standard economic model, many ordinary people care about desert in taxation based on pretax income. That is, if people earn money, they deserve to keep some of it, and, if they work less, they—in some ways—deserve less money, all for reasons unrelated to incentives to work. This commonplace view is inconsistent with the standard economic model for reasons relating to the hoary details of optimal tax theory, and the standard model's prescriptions are deeply undermined in the presence of desert-based views. To explain why people think this way about taxes but still support redistribution elsewhere, the Article introduces the idea that, to a large extent, people have "mental policy accounts," or category-by-category views about what is just for a given policy. That is, across policies, many ordinary people do not think like economistic social planners, 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.

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[48] Mankiw, Weinzierl & Yagan, *supra* note 39, at 159-61; Diamond & Saez, *supra* note 39, at 189.

[49] SHEFFRIN, *supra* note 8, at 130-31 (2013).

[50] 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).

[51] Mankiw, Weinzierl & Yagan, *supra* note 39 at 161-64; Diamond & Saez, *supra* note 39, at 166.

[52] 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).

A. Taxation Should Reflect Desert

The previous Section described the standard approach in "optimal" taxation—the welfare-maximizing distribution through taxes under a set of one-pieist assumptions that then allows nontax legal rules to be "efficient." This subsection describes major ways in which the standard optimal tax model differs from common views about just taxation.

Many people think that people "deserve" to keep part of their income. The seminal statement on such desert comes in 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.[53] 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.[54] 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.[55] 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."[56] 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."[57]

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."[58] 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.[59]

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."[60] The claim is not that taxation is impossible; that claim is, of course, false. Rather, the claim is that

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[53] LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 34 (2002).
[54] *Id.*
[55] *Id.* at 35.
[56] *Id.* at 36.
[57] *Id.* at 36.
[58] *Id.* at 175.
[59] *Id.* at 176.
[60] *Id.* at 175.

everyday libertarian views lead to a kind of 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 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 if incentives do not play a role. 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.

Recent evidence from Matthew Weinzierl, Steve Sheffrin,[61] 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.[62]

Sheffrin argues that "equity theory"[63] 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.[64] 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. Of course, defining exactly what proportionality means is challenging. The key point for the present purposes though is that *desert matters*: people have some entitlement to the money that they earn, and those who do not earn lack some entitlement.

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.[65] 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. Even 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),[66] even the

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[61] SHEFFRIN, *supra* note 8.

[62] *Id.* at 3.

[63] *Id.* at 35.

[64] ELAINE WALSTER, G. WILLIAM WALSTER, AND ELLEN BERSCHEID, EQUITY: THEORY AND RESEARCH 10 (1978) .

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

[66] *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).

most liberal candidates do not propose providing large unrestricted cash transfers to the poor. And Democrats commonly use similar language about desert.[67]

While there have now been several survey experiments done on the topic,[68] this Article will focus on one illustrative survey experiment. Weinzierl developed a compelling survey that showed the importance of desert based in pretax income.[69] He gives survey respondents a hypothetical in which two people have different pretax incomes, one richer (with an income of $60,000) and one poorer (with an income of $30,000). But the parties only get these incomes if they agree to jointly pay $18,000 for a public good. This setup removes any possible 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.[70] A typical social welfare function prescribes equalizing the incomes of the two people, because of the declining marginal utility of income. That is, the richer person should pay for the entire public good and also transfer $6,000 to the poorer person, so that both end up with $36,000. However, a large majority of respondents—75%—stop short of full equalization, and many stop well short of equalization.[71] Put differently, the entirely arbitrary "pretax income" appeared to have moral weight. Pretax incomes appear to generate desert.

Of course, though Weinzierl produces a variety of robustness checks, the evidence can be interpreted in a variety of ways. And nothing in the experiment suggests that people are not also motivated in part by standard utilitarian concerns; there is some redistribution after all. 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.

Building on similar reasoning, N. Gregory Mankiw makes a normative case that a "just deserts" perspective on taxation, in which "people should receive compensation congruent with their contributions," is the correct goal of taxation.[72] He argues that such a view "is more consistent with our innate moral intuitions" than the standard optimal tax model.[73] For example, he suggests that many people would still think that higher-skilled people should be paid more, even if there were no incentive reason for paying them more.[74] Yet the optimal tax model would

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[67] 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, 1:54 PM
EST), https://www.politico.com/story/2013/12/obama-income-inequality-100662. Indeed, Daniel Markovits argues that an ethos of "meritocracy" pervades our age, including the idea that, because success is meritocratic, the earnings from career success are thus deserved. DANIEL MARKOVITS, THE MERITOCRACY TRAP (2019).
[68] See sources assembled, *supra* note 10 ; Alberto Alesina et al., *Intergenerational Mobility and Preferences for Redistribution*, 108 AM. ECON. REV 521 (2018).
[69] Weinzierl, *Popular Acceptance*, *supra* note 10.
[70] The interface clearly showed how much money each party ended up with given a proposed allocation, making outcomes salient. *Id.* at 58.
[71] *Id.* at 56.
[72] N. Gregory Mankiw, *Defending the One Percent*, 27 J. ECON. PERSP. 21, 32 (2013);
N. Gregory Mankiw, *Spreading the Wealth Around: Reflections Inspired by Joe the Plumber*, 36 E. ECON. J. 285 (2010).
[73] Mankiw, *One Percent, supra* at 33.
[74] *Id.* at 29.

say that, absent incentive effects, everyone should have the same after-tax income. And, to boot, since the highly-skilled are so much more productive, they should effectively be forced to work harder to provide more resources to be redistributed. That is, since the costs of work are the same 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. That intuition may be shared by few.

Perhaps it is unsurprising then that real-world policy does not appear to reflect the optimal tax ideal.[75] 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.

Recall the typical implications of optimal tax theory. The first two implications of optimal tax theory are that there should be a large demogrant that everyone receives 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.[76] For example, a childless adult who is not working or in training may be eligible for little or no cash support from the government.[77] 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.[78] 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.

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[75] Mankiw, Weinzierl & Yagan, *supra* note 39, at 159-61.

[76] 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 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 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 https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits.

[77] *Id.*

[78] 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, 1:21 PM EDT); *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.

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,[79] there is widespread agreement that taxes have not kept up, though there is disagreement on the magnitude.[80] 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.[81] 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.[82] 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.[83]

A fourth implication of optimal tax theory is that people's features should be "tagged." There should be a tax on height, for example, because it is correlated with higher earnings. In practice, though we do see some tags like disability, we do not see taxation based on tags like height.[84] 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.[85] 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.

To summarize what these distributional impacts of tax policy add up to, recent advances in the empirics of taxation have allowed economists to quantify the redistributive views implicit in the tax code. The method, used by Nathaniel Hendren and others,[86] 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. 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. Hendren shows that our current tax code implicitly values a dollar in the hands of someone at the 10th percentile of income ($14,000) 1.5 times as much as someone at the 90th percentile of income ($179,000).[87]

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[79] 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, Laurence J. Kotlikoff & Darryl R. Koehler, *U.S. Inequality, Fiscal Progressivity, and Work Disincentives: An Intragenerational Accounting* (Nat'l Bureau of Econ. Research, Working Paper No. 22032, 2016).

[80] *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).

[81] 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 a particular context); 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 8, at 119-20.

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

[83] *See* DANIEL MARKOVITS, THE MERITOCRACY TRAP (2019).

[84] Mankiw, Weinzierl & Yagan, *supra* note 39.

[85] Saez & Stantcheva, *supra* note 81 at 33.

[86] Hendren, *Efficient Welfare Weights*, *supra* note 15; Lockwood & Weinzierl, *supra* note 80.

[87] Hendren, *Efficient Welfare Weights*, *supra* note 15, at 24 (Fig. 6).

By contrast, individuals' own personal behavior regarding risk implies a far higher weight on the poor relative to the rich.[88] For themselves, they value an extra dollar about *thirteen*[89] times more highly if they had an income at the 10th percentile than if they had an income at the 90th percentile.[90] 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. Knowing the appropriate social welfare weights is challenging. Nevertheless, this vast divergence is suggestive.

Inferring commonplace views from existing policies while trying to offer recommendations to improve policy leads to an obvious circularity problem.[91] Policies could look the way they do for many reasons, including political capture.[92] 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 next subsection will explain, another account would need to explain the great deal of redistribution through nontax means. Maybe asking the tax code to provide the redistribution necessary for a just society is simply asking ordinary people to accept something inconsistent with their moral intuitions.

More broadly, we are left with a major puzzle: 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 will return to potential policy implications of this dissonance. The writers described here disagree about whether desert to pretax income should count normatively. Weinzierl and Mankiw

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

[89] 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).

[90] *See*, for example, 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.

[91] *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.").

[92] *See, e.g.*, Philip Bump, *Who Actually Wants Congressional Republicans to Pass Trump's Tax Bill?*, WASH. POST (Nov. 2, 2017); Marissa Schultz, *GOP's Big Donors Threaten to Close Wallets if Tax Reform Isn't Passed*, N.Y. POST (Nov. 6, 2017); 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.

say yes. Murphy and Nagel say no. Sheffrin is inclined to at least partly consider these views on the basis of "consonance."[93] But all agree that these views are commonplace, which is the only claim this Article makes. 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 commonplace views for vast array of *nontax policies*, given that tax policy is set by Congresspeople who are at least partly answerable to voters.

B. Why? Mental Policy Accounts

One explanation for why people have nonstandard views about policy is that the views are normatively correct, either deontologically or as social preferences deserving normative weight. This Article, for the most part, puts those explanations to the side. To be as conventional as possible within economics, this Article assumes that the standard normative goal of maximizing societal welfare without regard to the means of redistribution is the right one. Instead, the Article introduces a novel explanation of commonplace redistributive views: "mental policy accounts," or partially compartmentalized category-specific views about good policy that do not reflect a holistic vision of tradeoffs across policies. 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).

The explanation builds on work in economics on "mental accounts." The example typically given for mental accounting is savings behavior.[94] 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.[95] 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 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 increases in the value of their stock.[96]

The maintained hypothesis of this Article is that, in many ways, individuals view policy in the same way that they view their personal mental accounts: with prudent rules of thumb that apply to each account. Economists tend to view welfare maximization as beginning with one big pie, containing taxes, environmental health,[97] healthcare, education, transportation spending,[98] minimum wage laws, etc., that can be distributed with perfect commensurability across policies as

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[93] SHEFFRIN, *supra* note 8 at 8-9 (2013) (describing "consonance" with existing policies).
[94] 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) [hereinafter "Thaler, *Anomalies*"]; Richard H. Thaler, *Mental Accounting Matters*, 12 J. BEHAVIORAL DECISION MAKING 183 (1999) (same).
[95] Thaler, *Anomalies*, *supra* at 194.
[96] *Id.* at 195.
[97] Maureen Cropper, Alan Krupnick & William Raich, *Preferences for Equality in Environmental Outcomes* (Nat'l Bureau of Econ. Res., Working Paper 22644, 2016).
[98] *See, e.g.*, Todd Litman, *Evaluating Transportation Equity*, VICTORIA POL'Y INSTIT. 2 (July 24, 2018), http://www.vtpi.org/equity.pdf (calling "[t]ransportation equity analysis" both "important and unavoidable" because "transport planning decisions often have significant equity impacts, and equity concerns often influence planning debates").

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. 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.[99] 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 mental policy account. A description of the mental policy accounts of all potential policies is beyond the scope of the Article. But to illustrate distributional views in a different mental policy account, consider in-kind "necessities," for which there appears to be widespread support for provision more egalitarian than the efficient prescription. 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.[100] 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.[101]

There are various indications of the mental policy 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;[102] 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.[103] And across countries there is widespread in-kind redistribution in areas considered necessities, such as healthcare, education, housing, food, and childcare.[104] 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.[105] 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. 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.[106] This policy is so notwithstanding the traditional

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

[100] 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").

[101] Scanlon, *supra* at 660.

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

[103] 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 Feb. 22, 2019), https://news.gallup.com/poll/4708/healthcare-system.aspx (showing that since the beginning of the poll in the late 1990s, large numbers of Americans—up to 69%, but never less than 42%—support healthcare as a right).

[104] Currie & Gahvari, *supra* note 30, at 335-37 (describing the in-kind programs across countries)..

[105] GRUBER, *supra* note 28.

[106] 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 mental policy accounts as well.[107] 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.[108] Other nontax mental policy 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. For now, though, it is at minimum arguable that people hold category-specific views. They have views about rights in healthcare that are more egalitarian than the efficient prescription. They have views about desert after being harmed by trade deals.[109] 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 could have major implications for the right policy to adopt in a given real-world situation. Section III addresses those implications.

But why do people have these policy mental accounts? In some sense, it should not be surprising that people think this way. 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").

And, as explained earlier, even in one's own 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 all policies and using the policy that best maximizes aggregate welfare. But those are really hard optimization problems, even for experts. For example, notwithstanding the broad tendency among economists to agree that the government should redistribute with taxes and

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

[107] *See also* 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).

[108] *Income Elasticity and Income Growth Estimates: Technical Memorandum* *2 (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 (2014), 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").

[109] Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. & SOC. 12 (2018) (arguing that a political backlash to advanced stages of globalization was predictable).

transfers and make other policies "efficient," there is huge disagreement over what "efficient" policy is: Until fairly recently, economics experts tended to argue that less regulation was generally more efficient.[110] However, in light of failures of competition, behavioral failures, and other market failures like information asymmetries, more economists now argue that government "intervention" is efficient.[111] The optimization problem that is hard for people who spend their whole lives on the task is yet more challenging for laypeople. And 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 related reason that people may have these mental accounts is difficulty monitoring politicians, whom voters do not fully trust.[112] People's lived experiences may have a positive correlation to the broader reality on this matter[113]—for example, people may observe how little the distributional consequences of trade deals have been offset.[114] 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 social norms of fairness may be important, rooting them in adaptive norms of fairness that evolved in small-group settings.[115] 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.[116] But even they acknowledge their existence. This Article makes no claims about their normative weight, but only says that they are important social phenomena.

Overall then, the Article operates from a maintained hypothesis about the social and political psychology of voters: Many have, in significant part, desert-based views about taxes, such as thinking 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

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[110] *See, e.g.*, MILTON FRIEDMAN, WHY GOVERNMENT IS THE PROBLEM (1993), https://www.hoover.org/sites/default/files/uploads/documents/friedman-government-problem-1993.pdf (discussing the problems of housing, taxicab, and agricultural regulation, among other issues); 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.").

[111] *See*, for example, the Economists for Inclusive Prosperity for a group of economists making this argument.

[112] 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, Kyu S. Hahn, Jon A. Krosnick, and John Walker, *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).

[113] *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).

[114] 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").

[115] KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 4, at 69-81.

[116] *Id.* at 70.

and, in turn, the efficiency-minded stance of law and economics. They think this way because they have "policy mental accounts" for taxation and other policies, each with its own rules-of-thumb policy views. As a result, there is imperfect fungibility across the mental 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 reflects these views is that there will not be enough redistribution through taxes, economists' chosen tool. Murphy and Nagel may have perfect logic about the "myth of ownership" of one's earnings, but word has not gotten out. Nor has word gotten out on optimal income tax theory. Rather, people have an aversion to both redistributionary 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 mental policy accounts.

III.   What to Do? An Illustration of Democratic Cost-Benefit Analysis

In response to the maintained hypothesis, one could adopt a variety of interpretations. For example, one could question whether the standard normative goals of economics are the correct ones. Economists have proposed a variety of possibilities, like Mankiw's "just deserts" theory of taxation.[117] To be as conventional as possible according to the standard economics logic, this Article takes a different approach: as a baseline matter, the Article stipulates that the standard economics social welfare function is correct: the means of carrying out redistribution carry no independent normative weight, and thus the most efficient means of redistribution should be used. That could be the wrong normative goal. If so, a panoply of other concerns, including those on equality of opportunity or process values, could suggest that standard efficiency prescriptions are incorrect.

Instead, this Article interprets the maintained hypothesis as leading to a kind of political constraint. In other words, there is not just one economic pie because not all means of distribution fare equally in the political process. Since voters have mental policy accounts—and, in particular, believe that desert based on pretax income is important in the tax mental policy account— Congress will redistribute less through the tax code than is welfare-maximizing. Of course, there could be other reasons helping to explain why taxes redistribute so little, even as many other means redistribute more; this Article explores the implications of mental policy accounts.

There are multiple concerns to the approach. Responses are sketched here. First, and most basically, 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.[118] Nevertheless, it seems reasonable to argue that widespread voters' views—especially among the well-off, who are likely most inclined to value desert[119]—have an important impact on those that

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[117] Mankiw, *One Percent*, *supra* note 72.

[118] *See generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE (2014) (showing that lay views correlate with policymaking—but that, controlling for the views of the well-off, the views of the poor show no relationship with actual policy); *see also* Omar S. Bashir, *Testing Inferences About American Politics: A Review of the "Oligarchy" Result*, 2 RES. & POL. 1 (2015) (criticizing the conclusion that politics is dominated by the preferences of the wealthy); J. Alexander Branham et al., *When Do the Rich Win?*, 132 POL. SCI. Q. 43 (2017) (making the same argument); Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSP. ON POL. 1053 (2015) (finding that the preferences of the middle class exert influence over policy).

[119] *See* SHEFFRIN, *supra* note 8, 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* 27-35 (NBER Working Paper No.

they elect. A second concern is that politics can change rapidly. As the Article discusses below, this factor should be considered, including by changing policies if those views do change. The features of the maintained hypothesis, though, seem like durable features of the U.S., and likely will continue into the future. Third, this Article only considers a subset of political constraints—those generated by voters' psychology. If followed broadly, political constraints could lead many places, such as placing additional weight on the views of people of Wyoming because of the existence of the U.S. Senate. But being helpful to policymakers by considering a subset of political constraints should not require consideration of *all* political constraints at once, in the same way that standard economic analyses commonly consider only one behavioral failing or other market failure.

The obvious response to misunderstandings leading to political constraints 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 taxes are an efficient way to redistribute and that giving people choices over how to spend resources tends to maximizes welfare, 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*.[120] Without denying that education can have an impact—indeed, evidence suggests that people are swayed by economics educations[121]—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[122] 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 to incorporate them in significant part. So this Article assumes that these ideas are, at least over the medium term, to some extent fixed. This Article returns in Section IV to the extent to which these commonplace intuitions are fixed.

Finally, before continuing to the illustration, it is important to make a clarification about the question on politics at stake here. In law and economics, it is typical to frame the issue as being one of needing taxes and transfers to "compensate" for distributional changes.[123] My own

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14825, 2009), https://www.nber.org/papers/w14825.pdf (finding income is negatively correlated with preferences for redistribution even after controlling for age, political ideology, race, gender, faith, education level, and other variables); Reed-Arthurs & Sheffrin, *supra* note 82 (discussing variables that helped explain heterogeneity within income groups concerning their views on redistribution through taxation).

[120] MANKIW, *supra* note 23.

[121] Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159 (1993).

[122] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962), http://circuloliberal.org/livros/capitalismo-e-liberdade.pdf.

[123] *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, Note, *Reducing Inequality, supra* note 32 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.").

work has portrayed the issue that way.[124] 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 poor results in compensation to the poor. This Article still suggests that redistribution could 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.

A key point of this Article is that the *reason* for the failure of taxes and transfers to appear matters for the policy response. For example, if political inertia were the reason for the absence of taxes and transfers, then it would be harder to justify why taxes versus nontax policies or why progressive versus regressive policies are particularly implicated. Similarly, if the story is about a capture of the political process by the rich, then again it is unclear why taxes versus nontax tools would be differentially implicated. This Article provides a novel account, explaining that voter psychology treats taxes differently as a means of redistribution, which yields a specific set of policy recommendations, to which the Article turns now.

A. An Illustration with Political Constraints

This Article's primary example is federal regulatory cost-benefit analysis ("CBA"). A voluminous literature covers distribution in regulatory CBA. As suggested earlier, the standard view in economics prescribes efficient outcomes that ignore distributional outcomes—for example, the lives of the rich valued at more than the lives 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.[125] He points to "a version of a political Coase theorem" in which the legislature undoes the distributional choices of the administrative agency.[126] 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.[127] They note that policymakers could "launder" preferences—that is, treat everyone as if they have the same income.[128] They do

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[124] Liscow, *Is Efficiency Biased?*, *supra* note 14; Zachary Liscow, *Are Court Orders Sticky? Evidence on Distributional Impacts from School Finance Litigation*, 15 J. EMPIRICAL LEGAL STUD. 4 (2018).

[125] Weisbach, *supra* note 123 at 178. Weisbach does allow the possibility that an agency should consider distribution "based on the particular circumstances."

[126] *Id.* 177.

[127] 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).

[128] *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*

not describe the factors that would go into setting appropriate distributional weights under political constraints. 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.[129] However, he explicitly would not consider general distributional consequences.[130]

Within CBA, this Article's specific example is Department of Transportation regulators' CBA allocating expenditures on transportation public goods between rich and poor people. As the Introduction discusses, current practice values commuting times of the rich more than commuting times of the poor because the rich are willing to pay more owing to their higher wages.[131] As a result, transportation spending tends to benefit the rich, not the poor. This Section asks: is valuing the time of the rich more than the time of the poor in allocating transportation spending a good idea?

Four main insights come from the illustration, paralleling the next four subsections. 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 maintained hypothesis, the Department of Transportation's current policy is mistaken. Desert-based views about taxes lower redistribution through that means, but people still care about inequality. The Department of Transportation errs in not equalizing its transportation spending to help achieve less 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.

B. Model Setup

This subsection describes the broad details of the model, the specifics of which are in the Appendix. Consider two representative individuals, one rich (with wages of $63 per hour) and one poor (with wages of $25 per hour), with the wages following current Department of Transportation practice. A standard public finance model in which people work less as taxes go up because their incentives to earn are dulled represents their behavior.[132] Everyone faces a flat tax as a share of income to produce government revenue. That revenue can be used for three things: a cash transfer to the poor, transportation spending for the rich (e.g., runways at airports), or transportation spending for the poor (e.g., buses). 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. There is a declining marginal utility of consumption, so a dollar generates more utility in the hands of a poor person than in the hands of a rich person, but raising taxes to redistribute shrinks the amount of income available by discouraging work.

Begin by comparing two models. The first, "standard" setup is called Model 0, such that:

Utility = standard utility

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.

[129] Richard L. Revesz, *Regulation and Distribution,* 93 N.Y.U. L. REV. 1489 (2018).

[130] *Id*. at 1578 (noting that "[s]keptics would say that only Congress can effectively and constitutionally undertake social policy of that magnitude").

[131] Liscow, *Is Efficiency Biased?*, *supra* note 14.

[132] *See, e.g.,* Saez, *Using Elasticities*, *supra* note 38.

where "*standard utility*" is a commonly-used function of utility that increases with more after-tax income and decreases with more work.[133] This model is the standard one-pieist utility function. Social welfare equals the sum of the utility for the rich person and the utility for the poor person. In this model, transportation planners maximize efficiency.

To this model, make one nonstandard addition: to account for the desert-based commitment against cash transfers not tied to work, the model directly adds to individuals' utility functions a dispreference for cash transfers to the poor. Thus, the larger the cash transfer not tied to work, the more utility goes down. This yields the following utility function for both the rich and poor, called Model A:

*Utility = standard utility – disutility of cash transfers to the poor * size of transfer*

So Model A is the same as Model 0, with just one change: there is disutility from redistributing through cash because people dislike such cash transfers on principle. Note that this model does not require any particular view about equality of opportunity or equality in the process of allocating transportation dollars. All that motivates the model are a desire for more equal outcomes and a distaste for cash handouts.

At this point, think of this utility function in Model A as a representation of *how Congress acts*—that is, not necessarily as a reflection of well-being, but rather as a political constraint. So, *social welfare* is still calculated the same way as in Model 0—as just the sum of the standard utilities. A politically attuned regulator continues to believe that this is how to calculate social welfare even if cash transfers are reduced because of views about desert in taxation.

Policymaking occurs sequentially in two steps. First, Congress appropriates funds for the cash transfer and total funds for transportation, maximizing the utilities above. Details are in the Appendix, but Congress sets these budgets by anticipating how the Department of Transportation will set transportation policy. Second, the Department of Transportation allocates the transportation funds separately to the rich and the poor taking Congress's actions as fixed. As is common in real policymaking, although Congress precisely specifies the distributional impacts of tax policy,[134] it leaves considerable discretion to the executive branch for the distributional impacts of regulatory and expenditure policy.[135]

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[133] The *standard utility* function is: $\log\left(wL(1-\tau) - \frac{1}{k+1}(L+H)^{k+1}\right)$, where w is wages, L is labor supply, τ is the tax rate funding transportation and transfers to the poor, H is commuting time (reduced by transportation spending), and $1/k$ is the labor supply elasticity. The poor also receive a cash transfer. The rich and poor have different wages and receive separate amounts of transportation funding. *See*, for example, Saez, *Using Elasticities*, *supra* note 38, at 222.

[134] 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.").

[135] 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)). 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,

The model shows concretely, for a particular illustrative example, how one 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. 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.[136] At the same time, the model allows for *tradeoffs*: in particular, for the transportation planner, the declining marginal utility of income driving redistribution to the poor versus the relatively low and declining returns to investment in infrastructure for the poor.

C. Results

1. Model 0: Standard view on transfers

Start with a baseline for comparison: the efficient, total-income-maximizing policy for transportation administrators after Congress redistributes optimally. This baseline result is shown in the top row of Table 1: spend only $2,622 annually on transportation per poor person, but spend $14,960 annually on transportation per rich person. Recall that the model considers one rich person earning $63 per hour and one poor person earning $25 per hour. The flip side is a large cash transfer to the poor: $21,990. With standard views on taxes, the optimal answer is current transportation policy: based on the standard efficiency analysis, spend substantially more to save an hour of time for the rich than to save an hour of time for the poor. The poor are willing to pay only their relatively small hourly wage to save an hour, while the rich are willing to pay their relatively large hourly wage. As a result, starting from a point where the rich and poor received equal transportation funding and only small transfers to the poor, it would be a Pareto improvement to spend less on transportation for the poor and then give larger cash transfers from the rich to the poor, saving money on transportation not justified on efficiency grounds and giving cash instead.

One way to understand the outcome is by considering 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. Since the Department of Transportation is efficiently maximizing total income and, a dollar in the hands of the poor should be worth the same as a dollar in the hands of the rich, the ratio of the distributive weights is 1:1, and an hour of time saved commuting is valued at $63 for the rich and $25 for the poor. So, for the transportation planner, a dollar is valued equally when used for the rich and the poor, even though post-tax and post-spending incomes are not equalized: the post-tax incomes of the rich and poor are $85,164 and $28,669, respectively. Of course, all else equal, a dollar continues to be worth more in the hands of the poor. But all is not equal: there is an efficiency cost to transportation spending on the poor instead of the rich, and this efficiency cost balances the redistributive benefit, leading to the 1:1 ratio of distributive weights.[137] Other

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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).

[136] *See supra* note 2.

[137] This analysis reflects two simplifications to reflect reality and sharpen the analysis. They have only small impacts on the results: First, reflecting what the Department of Transportation actually does, policy maximizes income and not

scholars, looking at the overall social weight, continue to place a greater weight on a dollar for the poor because of their lower incomes for those conducting cost-benefit analysis.[138] But the approach here would not do so because of the existing redistribution through cash and relative inefficiency of redistributing through transportation spending.

Finally, keep in mind going forward that "redistribution" is a term of art here. The baseline from which "redistribution" of transportation spending is judged is this efficient allocation in which the rich get far more transportation spending than the poor, not equal transportation spending.

Table 1: Transportation Spending Under Three Scenarios

	Optimal transportation spending	Cash transfer to the poor	Distributive weight to transportation planner, poor : rich	
1. Model 0: Standard model	Poor: $2,622 Rich: $14,960	$21,990	1:1	
2. Model A: Desert-based view on cash transfers and politically attentive regulators	Poor: $14,075 Rich: $8,412	$1,429	4:1	Welfare cost of adopting efficient transportation spending: 13.5% of income
3. Model B: Political constraints with naïve efficient regulator	Poor: $6,118 Rich: $16,369	$1,429	1:1	

2. Model A: Desert-based view on cash transfers and politically attentive regulators

Consider now transportation administrators' choice after Congress insufficiently redistributes through taxes. Under Model A, voters—and thus their Congresspeople—have desert-based views about taxes, resulting in transfers that are less redistributive than in the standard case. The second row of Table 1 show the results: the distaste for cash transfers leads Congress to spend only $1,429 on cash transfers, rather than the $21,990 in the standard model.

With the cash transfer cut dramatically, optimal transportation spending is more redistributive: $8,412 for the rich and $14,075 for the poor. The transportation planner's implicit distributive weight is 4 for the poor versus 1 for the rich, which offsets the higher wages of the rich. Effectively then the time of the rich is valued at $63 per hour, and the time of the poor is valued at $100 ($25 * 4) per hour. This spending depends on the trade-off between the standard efficiency cost and the redistributive gain. Transportation spending is one possible means of redistributing, even in the face of some efficiency loss. While welfare is not as high as under

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"efficiency," which would also take into the account the possibility that the transportation funds are used for leisure and not work. Second, the result that policy should be efficient after taxation depends upon taxes being very flexible—and, in particular, more flexible than a flat tax and a cash transfer. So, given this approximation (again reflecting the reality that the tax tools used in reality are not completely), it actually is valuable to not just maximize total income when setting transportation policy. Again, though, these effects are small.

[138] Adler, *supra* note 128.

Model 0, where the most efficient means of redistributing are used, the transportation spending on the poor helps pick up some of the redistributive slack.

But why not redistribute yet more to the poor? The post-tax income of the poor ($21,004) continues to be far lower than that of the rich ($116,862)—and indeed the incomes are considerably more unequal than in Model 0. The reason is that approach considers a crucial tradeoff: the more spending on transportation for the poor, the more the poor benefit, but the less each dollar produces in commuting savings because of the declining commuting savings of transportation spending. This solution balances that tradeoff.

3. Model B: Political constraints with naïve efficient regulator

The third case (Model B) follows current government policy: political constraints reduce redistribution through taxes but regulators nevertheless allocate transportation spending efficiently, weighting a dollar in the hands of the rich and poor equally. That is, transportation planners are naïve and allocate spending as if there were optimal cash transfers, even though they are not optimal. In particular, transportation regulators are faced with the total transportation budget and small cash transfer from Model A, but still allocate spending between the rich and the poor by maximizing total income as they did in Model 0. The result (Table 1, row 3) is spending $16,369 on the rich and only $6,118 on the poor.

Welfare is reduced by a large amount for just one policy: 13.5%. (As detailed in the Appendix, welfare impacts are measured as the amount of money that would be needed to compensate the parties for the loss in welfare versus the optimal transportation policy.) 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, under the maintained hypothesis, 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.

D. If Desert in Taxation Is Normatively Correct, Prescription Is Unchanged

The Article has thus far assumed that nonstandard views about taxation operate merely as a constraint and that they do not constitute preferences deserving moral weight. Some might disagree and argue that desert-based views on taxes do deserve moral weight and wonder how the results change if the desert-based views about taxation are normatively the correct ones.[139] Remarkably, even if desert-based views about cash redistribution through taxes do constitute the normatively correct values (at least as understood here), then the above results remain unchanged. Regulators should still "redistribute" through transportation spending—and in the exact same amount. From the perspective of the Department of Transportation regulator, the size of the cash transfer to the poor is fixed in both cases: Congress can vote for lower transfers out of a mistaken desert-based view or to reflect the true normative goal, and the amount of cash redistribution will be the same in the two cases. How cash transfers as a means affect social welfare does not affect the Transportation planner's decision. Therefore, since the parties value transportation spending the same in both cases and since the overall distributive goal is the same in both cases, the optimal

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[139] *See,* for example, Weinzierl, *Popular Acceptance, supra* note 10 (showing how optimal policy changes when this is the normative goal).

transportation spending is the same. Put differently, redistribution through transportation spending is totally consistent with having a distaste for redistribution *through the particular means of cash transfers through the tax system*, while also caring about inequality in general. Taxes are just one particular tool.

Thus, transportation policymakers can, to a large extent, remain agnostic about the normative consequence of desert in taxation. This deeper normative question of whether desert-based views on taxation have any normative force does not need to be answered to conclude that transportation regulators should spend more than the efficient amount on the poor, so that they can earn more money by getting to work more quickly. Other major normative questions remain, such as the appropriate distribution of income, but—if one agrees that there is at least a moderate chance that Congress acts as if desert matters for the *particular means* of redistribution through taxes, correctly or incorrectly—the policy prescription for Transportation spenders remains.

For other actors, the normative force of desert in taxation does matter. For Congress, if desert matters in taxation, then its small cash transfer is correct, whereas it is erroneous if desert is not normatively valid. Similarly, for economic experts, if desert-based views on taxes are normatively correct, then the prescription to educate people to consider cross-policy tradeoffs and break down the mental policy accounts no longer holds, since those mental accounts would have normative force.

E. Error Costs and Normative Uncertainty

Thus far, the Article has largely assumed that we know the right normative model. 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 normative amount of overall redistribution. This question leads to reasoning resembling "error cost" analysis in antitrust, which compares the costs of, say, erroneously allowing and erroneously preventing a merger.[140] This subsection follows a similar analysis.

Suppose for simplicity that there are two possibly correct normative models. As described above, in Model A, Congress does not redistribute as much through taxes because of a distaste for redistributing through cash in particular. And reinterpret Model B from above as reflecting the normatively correct policy. There is no distaste for cash in particular; rather, overall redistribution is just not very valuable. That is, caring about the welfare of the poor less than the Article has thus far been assuming is normatively correct. More precisely, for Model B,

Utility of the rich = standard utility

Utility of the poor = F · standard utility

The rich and poor have the same utility function (which increases in income and decreases in work), except that the utility of the poor is multiplied by some amount $F < 1$, which rationalizes why relatively little cash is redistributed to the poor.

Thus, seeing a low amount of cash transfers, leaders at the Department can believe one of two narratives (or a combination of the two):

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[140] *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).

Narrative A 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, high redistribution to the poor—including through transportation spending, which allows people to earn money—is good.*

Narrative B 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.*

Consider the error costs under both normative models.[141] As Table 1 showed, if Model A is normatively right but the Department of Transportation adopts Model B's prescription, transportation spending is insufficiently redistributive and there is a welfare loss of 13.5%. (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 B is normatively right (i.e., there is just a weak preference for redistributing), but regulators adopt the more redistributionary transportation spending of Model A, then there is also a welfare loss, though a smaller one: of 5.5%.

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 $11,909 on the poor and $10,578 on the rich. This resulting ratio of spending on the rich and poor is between the two extremes, though closer to the Model A outcome because the welfare costs of deviating from it are larger than the welfare costs of deviating from Model B.

This illustration reflects the rule in economics that the marginal cost of deviating from the optimal policy increases in the size of the deviation.[142] That is, being a little off from the optimal outcome for either Model A or Model B 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. Thus, given uncertainty about the right normative model, adopting a policy close to the middle of the two possibilities is prudent, so that there are not large deviations from either.

F.   Summary

Overall, the illustration reveals four main things. First, it shows concretely a framework for how policymakers can *think conceptually and practically* about distributive questions given reality of political constraints. Congress's taxation reflects desert-based views. This view is consistent with a strong desire to help 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.

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[141] As explained in the Appendix, so that the cash transfers and transportation budget are the same under Models A and B, this subsection sets as Congressional appropriations the average of these amounts that Model A and Model B would produce in isolation. Also, like for Model 0, efficient, income-maximizing transportation spending very closely approximates the welfare-maximizing spending.

[142] GRUBER, *supra* note 28.

Second, the welfare impacts 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. The welfare impacts show the cost of adopting the standard prescription of efficient in-kind benefits, like transportation spending, when taxes are inadequate 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 sensible (though by no means obvious) understandings of the declining utility of money from poor to rich.[143] There is a lot of redistributive space for nontax policy to productively fill.

Third, the regulator's right behavior does not depend upon whether the desert-based views driving reduced redistribution through cash transfers are normatively correct or not. In either case, so long as more redistribution than taxes provide is still good, regulators should respond with more equitable transportation spending.

And fourth, regulators need not be certain that mental policy accounts are at play to act. If they are uncertain about whether the tax and transfer system that they see is due to desert-based views about taxation in particular or a dispreference for redistribution in general, they should still adjust their transportation allocation to the poor in proportion to the likelihood that desert-based views about taxation are at play.

IV.   Other Considerations and General Policy Implications

The basic illustration shows how a regulator could respond in the case of transportation spending if Congress redistributes insufficiently through taxes. Essentially, various policymakers should take some understanding of a fair distribution of income, consider how much is already being redistributed through the tax code, and then use a suitable distributive weight. Various others have discussed using distributive weights.[144] Such analyses typically end without giving guidance on what such weights should be. And I am unaware of any that considers distributive weights *for a particular institution*, given the existing behavior of tax policy. The framework here—along with recent advancements at the cutting-edge of economics—allows us to actually suggest what those distributional weights should be.

How redistributionary the government policy should be is, of course, a difficult normative question. But, as discussed earlier, for the 10th versus the 90th percentile, one sensible (but of course contestable) approach would be to adopt a ratio of 13 *for overall government policy*.[145] Transportation regulators *for their own institution* then need to adopt a "nontax welfare weight" and adjust their redistribution downward for the amount of redistribution that already takes place through taxes: recall that the tax code currently implicitly redistributes with a distributive weight ratio of 1.5 for the 10th versus 90th income percentiles.

This weighting could still mean spending less on transportation for the poor than for the rich—or it could mean spending more on the poor by actually weighting their time more highly than that of the rich. In any case, under the maintained hypothesis, it means spending more than the efficient amount on the poor. Regulators would want to do the same thing across all cost-benefit analyses, as well as for any other policy analyses. That is, as long as the efficiency costs are not too high, legal rules typically *should* redistribute—and should continue redistributing up to the point that efficiency costs become too high.

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[143] Hendren, *supra* note 15.
[144] Adler, *supra* note 128 at 264-285 (providing an overview).
[145] *See supra* section II.A; Hendren, *Efficient Welfare Weights*, *supra* note 15.
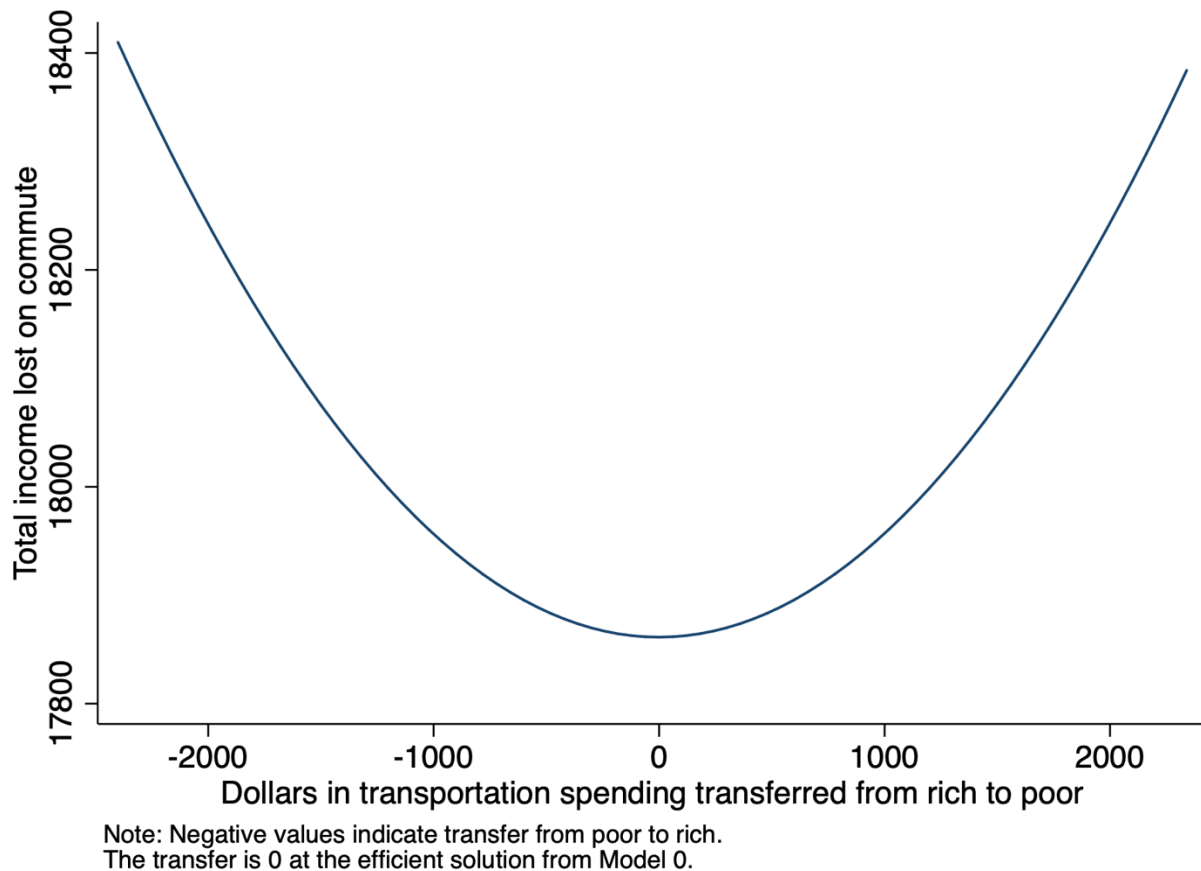
Recall from the previous section that, for modest deviations from the efficient policy of redistribution, the welfare costs are small because policymakers are close to the margin anyways in their decision-making. For example, consider Figure 1, which shows how much total income is lost as a dollar of transportation spending shifts from the rich to the poor, versus the "efficient" amount that maximizes total income in Model 0 (shown at point 0 on the x-axis). With only small amounts of transportation funding shifted, the marginal costs are small: the curve is rather flat, since a small shift does not reduce total income very much. But, as spending gets further and further from the efficient amount, the marginal costs increase as the curve becomes steeper and steeper. Consider shifting a dollar from the rich to the poor. The reason for the increasing slope is that the first shifted dollar of transportation spending is very similar to the optimal spending on transportation. But as more dollars shift, the government is increasingly spending on costly transportation that does less to produce income—for example shifting from bus routes in highly-trafficked neighborhoods to less-trafficked ones. And, at the same time, the government does the reverse for the rich: the first transportation investment for them the government was on the margin between doing and not doing to begin with, but as more money is taken away, increasingly valuable investments are withdrawn to fund transportation for the poor.

The same reasoning applies generally: the costs of adopting modest amounts of inefficient forms of redistribution are small because policymakers are close to the margin between choosing tax and nontax means of redistribution. For the same reason, it is better to increase redistribution a modest amount through many legal rules rather than increase redistribution a lot more through few legal rules.

The Article's proposal of "a thousand points of redistributing" a modest amount does not require a central planner. Rather, each actor needs to know 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 over time, each actor can, in principle, adjust on her own.

The Article here first describes six factors that complicate that story and affect how much policymakers operating in the shadow of insufficiently redistributive taxation should act, under the understanding that mental policy accounts with desert-based taxation drive the phenomenon. In other words, when evaluating tradeoffs between equity and efficiency in setting policy, what factors should politically attuned policymakers consider? Second, the Section speculates about what precise decision rule policymakers should use given that political constraints may exist for in-kind redistribution. In particular, it considers the efficiency costs and potential political feasibility benefits of an "equal treatment" heuristic, in which the rich and the poor are in some sense treated equally policy-by-policy.

Figure 1. Lost Income from Transfering Transportation Spending Between Rich and Poor

Note: Negative values indicate transfer from poor to rich.
The transfer is 0 at the efficient solution from Model 0.

A. Other Factors Determining Optimal Nontax Redistribution

1. Other Nontax Policies Currently Redistribute

The maintained hypothesis of this Article is that, because of commonplace desert-based views, taxes do not and are unlikely to redistribute enough to achieve distributive justice. But, as described earlier, nontax policies like those in housing and healthcare arguably already do redistribute beyond the efficient amount.[146] The current presence of nontax redistribution reduces the desirable amount of redistribution through policies like transportation. The more existing in-kind redistribution there is, the less distributive weight there should be on the poor and the less the transportation spenders 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 is fundamentally a normative one, depending 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

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[146] Note 42 *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.

thought that income inequality in the U.S. was a big or moderately big problem.[147] And across the political spectrum, there is discussion of the problem of inequality. For example, Mitt Romney, Jeb Bush, and Rand Paul all complained about the continuing rise in inequality during the Obama presidency.[148]

But why might mental policy 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 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 insufficiently redistributive taxes and efficient nontax policy 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.[149] The tax code specifies exact tax rates for exact incomes,[150] which are typically set in heated, salient political battles.[151] 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 decisionmaking, but probably 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.[152]

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.[153] 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, 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, tort law,

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[147] *See, e.g.*, PEW RESEARCH CENTER, *supra* note 2.

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

[149] MICHAEL J. GRAETZ, DEBORAH H. SCHENK, & ANNE L. ALSTOTT, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES (8th ed., 2018); *see* EPSTEIN & O'HALLORAN, *supra* note 134; Hines Jr. & Logue, *supra* note 134.

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

[151] GRAETZ, SCHENK, & ALSTOTT, *supra* note 149, 6-12) (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.

[152] 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).

[153] *See* Conglianese & Yoo, *supra* note 135; Epstein & O'Halloran, *supra* note 135 . *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, Ernest Gellhorn, & Glen O. Robinson, *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*, YALE L.J. (2006) (arguing that agencies possess unique capabilities for interpreting congressional commands).

environmental law, and transportation spending—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. 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, which is sensible because one of the main justifications for delegation is expertise.[154] And, since experts in agencies[155] and on courts[156] 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 nature of lay beliefs. Specifically, the salience of taxation for voters significantly limits Congress's redistributionary 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.[157] Transportation spending could be one of those issues on which individuals have no particular view, which is how the Article modeled it. 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

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[154] 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).

[155] Cass R. Sunstein, The Cost-Benefit Revolution 6-21 (2019) (discussing the "Triumph of the Technocrats" across the Reagan, Clinton, and Obama administrations); Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 Colo. Nat. Resources, Energy & Envtl. L. Rev. 287, 287 (2019) (describing "how, over several decades, cost-benefit analysis came to dominate federal environmental policy."); Richard A. Posner & William M. Landes, *The Influence of Economics on Law: A Quantitative Study* 51 (Chi. L. & Econ. Working Paper No. 9) ("[T]he growth in the influence of economics on law exceeded that of any other interdisciplinary or untraditional approach to law . . . .").

[156] Elliott Ash, Daniel L. Chen & Suresh Naidu, *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).

[157] Peter Diamond & Jerry Hausman, *Contingent Valuation*, J. Econ. Persp. 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).

redistributive relative to the efficient baseline. In contrast, torts[158] 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 redistributionary mental policy 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 illustration, that redistributing more than the efficient amount 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 mental policy 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 largely 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 mental policy accounts.

2. 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[159] and, the less of one type of redistribution we have, the less they learn about it.[160] 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 that more in-kind redistribution causes less efficient redistribution is difficult to judge and is ultimately an empirical question. If the median voter theorem[161] 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

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[158] *See infra* section IV.B.

[159] 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).

[160] 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).

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

unaware of any evidence on the response by Congress to the distributional implications of regulatory policies.[162]

One piece of evidence of more nontax redistribution *not* impacting taxes comes from court orders on education spending.[163] 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 the rich. No social programs that benefit the poor are discernably 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.

In any case, under the reasoning described before, for small or modest amounts of redistribution through legal rules instead of taxes, the cost will be relatively small. Even under the standard view, policymakers are on the margin between the efficient amount of in-kind provision and a little more, so a little more in-kind redistribution (instead of taxes) is not very costly to welfare. Of course, large deviations could lead to large costs.

3. 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"[164] redistribution—a kind "kludgeocracy."[165] 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.[166] 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. These two reasons militate in favor of doing the second-best redistribution today. Nevertheless, the risks of inertia in inefficient redistribution remain a consideration against second-best redistribution.

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[162] 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).

[163] Liscow, *Court Orders*, *supra* note 124. *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).

[164] Lipsey & Lancaster, *supra* note 12.

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

[166] Liscow, *Is Efficiency Biased?*, *supra* note 14, 1665.

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.

4. 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 do 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. But, since such requirements may lead landlords to raise rent, low-income lessees may not end up better-off. Second, some regulations, which Cass Sunstein calls the "easy cases" for using efficiency,[167] impact the prices that parties pay or the wages that they receive, such as with workplace regulations that reduce demand for workers and lower their wages. 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.[168]

5. Other, Non-Standard Normative Goals

This Article has thus far assumed that the standard welfare function is correct: no concerns with fairness count beyond overall redistributive preferences. Especially in light of what is arguably the large failure to enact the recommendations of the standard 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 (unlike in the illustration) 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.[169] Or, if equality of opportunity in getting to work is important, then more equal spending would be valuable. In either case, a welfare function that gave 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 more on them. And the myriad other possible values—equality-oriented or otherwise—could impact the extent of desirable redistribution in both directions.

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[167] CASS SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018).

[168] One significant exception to the concern that redistributionary 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.

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

6. Endogenous Political Changes: Political Power and Legitimacy

Another factor is endogenous political changes. For example, poorer people with better transportation access may be more active politically—and perhaps vote more.[170] 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.[171] 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.[172] To the extent that this mechanism is operative, under the maintained hypothesis that people have mental policy accounts supportive of in-kind redistribution, more weight should be put on redistributing to the poor through in-kind means. 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.

B. Redistribution Through Legal Rules, Politics, and an Equal Treatment Heuristic

The Article has emphasized the political infeasibility of redistributing through taxes, but a symmetric question also matters: the political feasibility of redistributing through nontax in-kind goods or legal rules. An implication of the preceding analysis is: Wherever politically feasible, redistribute more than the standard "efficient" amount up to the point that the efficiency costs become too large. A full analysis of political feasiblity is beyond the scope of the Article, but it is important in an analysis on political feasibility to at least suggest that the proposed alternative to taxation is politically feasible.

Presumably, sometimes the nontax alternative is feasible, and sometimes it is not. Section II.B described how people seem to view some goods—like healthcare, housing, education, and food—as necessities, making redistribution through those means more feasible. As to the Article's specific example, unfortunately we know little about commonplace views on regulatory cost-

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[170] 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/.

[171] TYLER, *supra* note 19.

[172] 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, supra* note 109; Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harvard Kennedy School 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").

benefit analysis or on transportation spending.[173] Indeed, we do not know if people pay much attention to such regulatory processes at all. That said, the equal "value of a statistical life" given to the rich and the poor, in contradiction to the efficiency-oriented regulatory practices of the Federal government, suggests that people do pay attention to that rule, and that they would not like unequal treatment.[174] And presumably people pay a fair amount of attention to the transportation options they have, though perhaps not their options versus those of others.

I speculate that, as a matter of process, valuing the time of the poor closer to (but not more than) the time of the rich would seem fair. And, I speculate that, as a matter of spending outcomes, improving peoples' ability to get to work resonates in equality-of-opportunity terms that are likely politically appealing, as encouraging work seems to be a widely-held value.[175] On the other hand, those primarily concerned with economic development may want to spend considerably more on the rich, owing to their greater wages and output per marginal hour worked—but that is an objection to any redistribution to the poor beyond the efficient baseline. So I speculate that valuing the time of the rich and poor similarly in transportation is a fairly politically feasible form of redistribution.

Other times, redistribution beyond the efficient amount may not be politically feasible. Consider the following redistributive example. Suppose that an agency is analyzing two regulations, both of which will increase the profits of harmed parties by $1 million through pollution reduction. The first regulation benefits owners of small businesses who tend to be relatively poor (say, owners of laundromats), while the second regulation benefits large corporations by $1 million, whose owners tend to be rich. Both rules cost $1 million to two different polluters, both of whom are owned by those with average incomes. The logic of distributional weights means that we should adopt the first regulation but not the second one, since benefitting the poor is more valuable than benefitting the rich. But one could imagine resistance to such a rule for the same reason that there may be resistance to valuing two lives differently, as it explicitly values $1 in the hands of rich more than $1 in the hands of the poor.

Or, switch the example from a regulatory context to a tort: a rich person and a poor person have their cars rear-ended by the same middle-income person, and each incurs $5,000 in costs to their cars. The Article's logic suggests that the damages paid to the poor person should be larger than those to the rich person. Compensatory torts process norms may make different treatment of two people who suffered the same financial damages unpalatable. In other words, the same process norms of equal treatment that support treating the poor more like the rich may work against actually valuing the time of the poor more highly than the time of the rich in the transportation case or giving larger damages to the poor in the torts case.

An "equal treatment" heuristic—of equally valuing the time of the rich and the poor, and engaging in similar treatment across other legal rules—is one alternative. As Murphy and Nagel

[173] *But see* Rena Steinzor, *The Unpopularity of Cost-Benefit Analysis*, HUFF. POST (Sept. 17, 2012), https://www.huffpost.com/entry/the-unpopularity-of-costb_b_1884369 (asserting by implication, but not citing any hard empirical evidence, that cost-benefit analysis is unpopular among the American public).

[174] *See* Cass R. Sunstein, *Are Poor People Worth Less than Rich People? Disaggregating the Value of Statistical Lives* 5-6 (John M. Olin Law & Economics Working Paper No. 207, 2004) ("When risks are faced disproportionately by wealthy people, VSL, based on actual WTP, should be higher than $6.1 million—just as it should be lower when it is faced disproportionately by poor people."); *see also* Cass Sunstein, *Cost-Benefit Analysis and the Environment*, 115 ETHICS 351, 371 (2005) ("[G]overnment does people no favors by forcing them to pay the amount that they would pay if they had more money."); Cass R. Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, 4 J. BENEFIT-COST ANALYSIS 237, 243 (2013).

[175] *See* Robert A. Moffitt, *From Welfare to Work: What the Evidence Shows,* Policy Brief 13 (Brookings Inst., Wash. D.C.) Jan. 2, 2002, at 1 ("The American public has made clear that work by welfare recipients is a defining goal of state and federal welfare laws….").

argue, "[t]he moral ideas that do the work of legitimation have to be graspable and intuitively appealing, not just correct."[176] Equal treatment is graspable, is intuitively appealing, and would move in the right direction distributionally. This equal treatment heuristic resembles the conclusions reached by some liberals[177] and some welfarists who wish to "cleanse" the impact of income,[178] but does so on different grounds: the reasoning is neither liberal nor a modified version of welfarism that ignores the Pareto gains that can come from redistributing cash rather than other goods. Rather, the normative reasoning is purely conventional: there's a standard welfarist goal, but various government actors face constraints of using methods of redistribution that are feasible.

An equal treatment heuristic has welfare costs compared to using distributive weights because in some cases it redistributes too little and in other cases it redistributes too much. Consider the distinction between "neutral rules" and "rich-biased rules."[179] Neutral rules provide the same efficient legal entitlement to the rich and poor. The earlier examples of poor versus rich owners of businesses that are polluted on and poor versus rich car owners who are rear-ended are examples of neutral rules: since rich and poor people value a dollar the same, the efficient rule is to treat the rich and poor equally. Thus, under an equal treatment heuristic, neutral rules are insufficiently redistributive: since the efficient rule is equal treatment, failing to redistribute more than that misses out on low-cost opportunities for redistributing.

Rich-biased rules, in contrast, allocate more of a legal entitlement to the rich than the poor because of the rich's greater willingness to pay. The transportation example is rich-biased: the rich are willing to pay more for transportation spending, so the government allocates more to them than to the poor. An equal treatment heuristic thus may redistribute too much or too little to the poor for rich-biased rules. In Section III's illustration, an equal treatment heuristic would redistribute too little to the poor, since redistributing through transportation was not very inefficient and so little was redistributed to the poor through taxes. But, in other cases, where redistributing is costlier or where we believe that taxes are not as insufficiently redistributive, equal treatment will lead to an insufficiently high amount of redistribution.

Averaging out neutral legal rules with insufficient redistribution and rich-biased legal rules with excessive redistribution would not maximize welfare for two reasons. First, doing so might redistribute the wrong amount—too little if neutral legal rules predominate or possibly too much if rich-biased legal rules predominate. Second, the heuristic would miss efficient opportunities to redistribute through neutral rules in exchange for excessive inefficient redistribution through rich-biased rules. The welfare cost of adopting the equal treatment heuristic versus distributional weights thus depends on two factors: first, how far overall redistribution is off from the optimal amount and, second, how heterogeneous the costs of redistribution are across different legal rules, thereby driving up efficiency costs. But, so long as cash redistribution is very insufficient, so that equal treatment rarely "overshoots" in redistribution for rich-biased rules, an equal treatment heuristic is still an improvement on always having efficient legal rules.

Whatever the particularities of political feasibility in any given case, though, the policy advice remains: If standard notions of welfare are the goal and desert matters in taxation, then redistribute a modest amount more through the myriad other nontax means up to the point where the increased distributive benefits no longer outweigh the efficiency costs.

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[176] MURPHY & NAGEL, *supra* note 53 at 188.
[177] Samaha, *supra* note 169.
[178] *See* Adler, *supra* note 128 (describing cleaning preferences).
[179] Liscow, *Is Efficiency Biased?*, *supra* note 14.

V.   Addressing Critiques

The Article 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. It is beyond the scope of the Article to define such a distribution. Any given set of assumptions could over- or under-state the optimal distribution of resources. However, uncertainty about the right distribution 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. It suggests that the distribution we see is roughly the right distribution. Given widespread concern about inequality and the evidence in favor of mental policy accounts, this view may be naïve.[180] 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 a fair one, then the Article has little to contribute prescriptively (though it still contributes descriptively). If, on the other hand, one believes that the distribution is not currently fair, this Article gives guidance on how to maximize welfare given the maintained hypothesis about mental policy accounts on tax and nontax policies. Another way to understand the Article is that, if one is uncertain about what the right distribution of resources is, the maintained hypothesis 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 maintained hypothesis. The maintained hypothesis is that a large number of ordinary people do not think of the appropriate amount of "redistribution" across all policies. Economic policy wonks think about the issue that way, but not large numbers of ordinary people. 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

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[180] 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).

the funds between the rich and the poor.[181] 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 regulators to decide distributional questions. Acknowledged, deciding on distributional weights is a normative decision that will of necessity involve significant arbitrariness. But, as the transportation example showed, efficient allocations themselves have major distributional implications. Furthermore, it is not difficult to apply a list of distributive weights. And if the case-by-case equal treatment heuristic is adopted, setting equal values for everyone is simple. Indeed, 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.

VI.   Other Applications

Using the example of regulators conducting cost-benefit analysis for transportation spending, this Article has illustrated how policymakers should maximize welfare while responding to political constraints. The implications of the social psychology of voters about taxation can be applied elsewhere too. The Article suggests a three-part hierarchy of responses to mental policy accounts about taxes if the standard economics account is normatively right. The first response, as discussed in Section III, is to advocate for the value of the most efficient forms of redistribution— a form of "debiasing." 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.

A. Advocate and Educate

Law school courses commonly describe the efficient solution as the "law and economics" prescription. 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 the welfare-maximizing policies that are politically achievable.

That said, if standard economic theory is normatively correct, it would be a mistake to give up on the argument that desert does not inhere in pretax incomes because those pretax incomes are themselves the product of legal institutions and that cash provides choice to its recipients, often yielding advantages over nontax means of redistributing. The first-best solution thus remains advocacy for such policies, but without sacrificing redistribution to help those in need today.

B. Approximate: Congress and Cash-Light Tax Policy

The second set of responses in the hierarchy is approximating first-best cash-like policies. Consider again transportation spending. If the optimal tax policy is to give everyone a demogrant, then a refundable transportation 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

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[181] *See supra* note 1.

transportation). Private spending on transportation is different from public spending, of course, but this private spending could be a partial substitute. Alternatively, if it were important that the funding go to public goods, the transportation tax credit could be received for a contribution to local public goods.[182]

This is actually a live political issue.[183] There is significant ongoing debate—including during the debate concerning the 2017 Tax Act—about the extent to which transportation expenditures should be tax deductible. Under the logic in this Article, providing cash is welfare-maximizing. But tax subsidies for transportation spending largely provide relief based on what people were *already going to spend*—thus, effectively providing a cash transfer. The logic of the Article thus suggests providing some deductibility or credits for spending on transportation, which then phases out at higher incomes, to target the benefits to lower-income earners. Of course, there are a host of other 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 the transportation spending deduction, and an account that leads to particular design features, like a phaseout.

More generally, policymakers could aid low-income taxpayers through tax expenditures, the popularity[184] of which could in part be driven by desert to pretax income, since they "reduce taxes" and thus let people keep more of their income. Like the commuting subsidy that phases out with income,[185] a variety of tax expenditures could be targeted at lower-income households. Tax expenditures that merely transfer cash and do not change incentives are typically frowned upon by the tax policy community. This Article flips the standard logic on its head. Rather than being a bug, not changing behavior is actually a *feature*: tax expenditures can become a way of transferring cash to low-income people without distorting their behavior.[186]

Additionally, if the maintained hypothesis is right that desert matters and that the desert comes from *pretax* incomes, then Congress could modify tax policy in several other ways that both redistribute more and are politically feasible. One way is to tax high-income employees on the *employer* side to subsidize low-income employees. We are accustomed to thinking of employees as earning a salary and then paying taxes based on that salary. In fact, employers can and do pay taxes based on their employees' salaries, principally through payroll taxes that nominally fund Social Security and Medicare[187] but also for purposes like unemployment insurance.[188] And, for high-income executives, the tax code limits the amount of compensation that publicly-traded employers can count as business expenses.[189] If voters read such taxes partly as taxes on businesses, rather than as taxes on the earners themselves, then it may be tolerable to impose such taxes on employers (though, of course, there would be implementation difficulties,

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[182] This would resemble the state and local tax deduction.

[183] 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).

[184] Clarke & Fox, *supra* note 18; Haselswerdt & Bartels, *supra* note 18.

[185] *See* Section III.C.

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

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

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

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

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). 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.

C. Tilt: Redistributing Through Courts and Legislatures

If advocacy and approximation fail, then it makes sense to engage in the exercise described above for transportation cost-benefit analysis: every part of government should tilt its policies to be more redistributive, where politically feasible and where efficiency costs are not large.

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 such redistribution, such as allowing significant awards for pain and suffering, which some evidence suggests juries use to provide larger damages to poorer groups.[190]

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.

Voters, legislatures & in-kind provision

A theme of this Article is that institutions and politics matter when considering what policies should be. Thus, the Article considers policies in a particular institutional setting. Another important institutional setting is the legislature itself. For example, if a well-trained economic policy wonk has one-piest views, but knows that other voters do not, should that change her voting behavior? Suppose, for convenience, that the wonk is voting for a pivotal member of Congress (or alternatively a Presidential candidate). Suppose further that the vote is pivotal. Finally suppose (as is the case for nearly all the current Democratic primary candidates, including the most liberal ones) that there is no option to give large cash transfers to the poor. But there is an option who will raise a flat tax to fund an in-kind transfer and a second option who will not do so. There is thus a case that a welfarist should vote for the first option as a second-best alternative to the unavailable policy plan with more efficient redistribution.

Take the particular case of healthcare. As discussed in Section II, the standard economic view is that someone in his 50's 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.[191] But mental policy

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[190] 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).

[191] *See supra* note 106.

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. This Article suggests analyzing whether provision of healthcare is welfare-enhancing as follows: Measure the willingness to pay of the poor for the healthcare, appropriately adjust by the right distributive weight, and compare that to the cost. So, adjusting for the factors above in Section IV, 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.

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, one could apply the Article's logic here. Even the most economics-oriented voter should support "inefficient" childcare if he accepts that 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.

Conclusion

We live in a democracy, with voters electing politicians and many institutions operating together to yield the set of policies that produce distributive outcomes. Yet, in making policy recommendations, law and economics analysis (like economics analysis) overwhelmingly acts like there is one benevolent dictator.[192] But, because the standard law and economics approach to distributive questions requires many actors across many institutions to act in particular ways, it essentially requires that these actors agree with the propositions for which standard law and economics and optimal income theory stand: taxes should redistribute and everything else should be efficient. The Article argues that the twin enterprises of law and economics and optimal income taxation have been unsuccessful in convincing the general population of their positions.

Since we live in a democracy, and people vote for their representatives, even assuming that standard law and economics is completely right normatively, legal rules should adjust to the constraints that voters' views impose on policymaking. Describing the unconstrained optimal policy is helpful for policymakers. So is describing what should actually be done in the real world. This Article is thus unapologetically "second-best" in developing an alternative set of policy recommendations that turns law and economics on its head: Rather than never redistributing through legal rules, legal rules should typically redistribute modestly where politically feasible. Such an approach is "democratic" in that it considers real-world institutions and lay views, and it will end up redistributing in ways more consonant with popular opinions—not because those popular views have normative weight, but rather because some of them are the politically feasible, low-cost means of redistributing.

The analysis also allows consideration of a hallmark value of economic reasoning: tradeoffs. How much should a given policy redistribute? As long as it is efficient to do so.

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[192] MANKIW, *supra* note 23; STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2009); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2018); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (2016).

Describing not only to the extent that taxes fail to redistribute, but also to a host of other factors that policymakers should consider, the Article points the way forward in the analysis of legal rules given widespread policy views at odds with law and economics reasoning. In particular, the Article shows how policy should respond given "mental policy accounts," in which voters have policy-specific distributive views without fully considering the complex optimization problem trading off each policy against all other policies. They instead use rules of thumb, such as the idea that the tax code should reflect desert, which limits its redistributiveness in practice.

But, though this Article develops a framework for analysis, many questions remain for future scholars. One set of questions is empirical. How fixed are views of desert that reduce the political desirability of redistribution through giving out cash? How fungible in practice is redistribution across different means? Put differently, what is the right model of politics for setting distributive policies: to what extent do our politics operate as if there really is one big pie to be maximized[193] versus operating through policy-by-policy battles, each with its own, at least partially independent, distributive outcome?[194]

Another set of questions is conceptual. This Article emphasizes political constraints that commonplace citizen views place on policymaking. In calling such views reflective of "mental policy accounts" and discussing political constraints, it may suggest that there is not a moral logic behind such views. But that is only one possible approach. Another one—described briefly in this Article, but mostly beyond the scope of this paper—is incorporating these views as normatively valuable themselves. Such an approach would raise a host of questions, including how to measure and quantify such views and how to address repugnant views (e.g., racist ones). Yet another approach allows the possibility that nonstandard views contain information embedded in them.[195] For example, perhaps from interacting with their friends and family, people have a sense for whether others irrationally work too much or too little, with implications for the extent to which work should be encouraged or discouraged.

A final set of questions is methodological. The approach here is fundamentally technocratic: An expert in a particular institution knows (or has educated guesses about) the right answer, but there are constraints elsewhere in the system; this Article offers guidance on how such an expert policymaker should act. A separate question is: to what extent do the uncertainties opened up by this Article militate in favor of normative modesty and deference to nonexperts or "democratically-determined" outcomes?

Answers may become apparent as the implications of other forms of more realistic psychology are considered in other contexts, including those outside of questions about inequality. For now, though, the example of regulatory cost-benefit analysis of transportation spending for the rich versus the poor illustrates the stakes. Current policy tends to help the rich get to work more than the poor, who need it the most. It is striking that even administrations like President Obama's, that hoped to address issues of inequality, adopted this policy on the basis of narrow, blinkered preconceptions about politics. More generally, something has not worked very well with the standard expertise for the past few decades, yielding neither robust economic growth[196] nor greater

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[193] This is consistent with at least a simplified reading of the "median voter theorem" in which all that matters are overall distributive outcomes. *See, e.g.*, DOWNS, *supra* note 161, at 51-74.

[194] *See* Liscow, *School Finance*, *supra* note 124, at 5 (offering example of school finance in which increased court-mandated funding for school finance for the poor does not result in less support for the poor elsewhere).

[195] *See*, for example, Weinzierl, *A Welfarist Role for Nonwelfarist Rules*, *supra* note 10 (taking a such an approach).

[196] 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.

economic equality[197] nor greater trust in government policy.[198] Populist revolts around the world put economic policy up for grabs. It may be time to try something a little different.

Appendix

A. Model 0: Standard Model

Two representative economic agents of the rich and poor are indexed by r and p. Each supplies L_i units (e.g., hours per year) of labor, paid at wage w_r for the rich and w_p for the poor. Each 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 ($s \geq 0$). These preferences are represented with log utility functions given by,

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

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

Here, k is exogenously given, τ represents the rate at which the individuals' income is taxed, and H_i is the length of individuals' commutes. 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. H_i is a convex function of the level of government spending T_i on transportation services for each group. Specifically,

$$H_i = \alpha \frac{T_i^2}{2} + T_i z + Q \tag{3}$$

where $\alpha > 0$, $z < 0$, $Q > 0$, which yields a linear marginal impact of T on H.

T_i and s are funded by revenues from the tax on the individuals' income and are, along with τ, chosen by a social planner to maximize a welfare function $W(U_r, U_p)$, which is the sum of the individuals' utilities. The revenue constraints binding the social planner are given by,

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

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

To mimic the way regulators actually determine efficient allocation of funds, transportation planners choose the allocation of transportation spending that maximizes income.

The main body uses parameters $w_p = 25$, $w_r = 63$, $k = 1.075$, $\alpha = 0.00013$, $z = -0.056$, $Q = 10$, and $\lambda = 0.00175$. The figures are calibrated so that the rich work a 2,000-hour work-year.

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[197] Piketty & Saez, *supra* note 79. 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).
[198] Uri Friedman, *Trust is Collapsing in America*, ATLANTIC (Jan. 21, 2018), https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964.

B. Model A: Desert-Based Views on Cash Transfers

To represent the possibility that many people may have a distaste for giving out cash transfers, I first add to equations (1) and (2) a preference that the poor not receive transfers without working for them. I express this change by putting a distaste parameter λ, shared by both the rich and poor, on the transfer s (with $\lambda > 0$).

This addition yields the following utility functions:

$$U_r = \log\left(w_r L_r (1 - \tau) - \frac{1}{k+1}(L_r + H_r)^{k+1}\right) - \lambda s \tag{4}$$

$$U_p = \log\left(w_p L_p (1 - \tau) + s - \frac{1}{k+1}(L_p + H_p)^{k+1}\right) - \lambda s \tag{5}$$

All other features of the model remain unchanged. I then solve for the values that maximize utility, subject to the revenue constraint explained in subpart D below.

C. Model B: Less Redistributive Goals Overall

Model B includes a new parameter, F, that represents some discounting of the utility of the poor, such that U_i become,

$$U_r = \log\left(w_r L_r (1 - \tau) - \frac{1}{1+k}(L_r + H_r)^{k+1}\right) \tag{6}$$

$$U_p = F \cdot \log\left(w_p L_p (1 - \tau) + s - \frac{1}{1+k}(L_p + H_p)^{k+1}\right) \tag{7}$$

where $0 < F < 1$.

Model B captures an alternate explanation for low cash transfers, relative to the "efficient scenario," other than a disutility of cash transfers (i.e. $\lambda > 0$): distaste for the utility of the poor itself. F is calibrated to generate the same s as Model A produces. As for Model 0, I then set transportation spending to maximize income, subject to the revenue constraint explained in subpart D below. (These results are nearly identical to solving for the transportation spending that maximize utility.)

D. Setting the Transportation Budget

To have the same budgets in Models A and B, the Article follows the following two-step procedure: First, using the revenue, R^m, and transfer, s^m, found in unconstrained Models (m) A and B, find the average total transportation spending, T, of the two models:

$$T = \frac{(R^A - s^A) + (R^B - s^B)}{2} \tag{8}$$

Second, for each of Models A and B—keeping fixed the F already found in the unconstrainted Model B—add a new revenue constraint restricting the social planner to this level of transportation spending:

$$T = \quad T_p + T_r \tag{9}$$

As a result of this procedure, Models A and B have the same transportation spending available to the regulators, consistent with the real Congressional appropriations process. In the main text, Models A and B reflect this constraint.[199]

E. Measuring Welfare Impacts

Welfare impacts are measured through the following four-step process: First, calculate welfare under the normatively correct model with optimal policy; call that C (for "correct"). Second, calculate welfare under the normatively correct model, but with the different spending from the alternate model; call that E (for "erroneous"). We know that $C \geq E$ because C has the optimal (i.e., welfare-maximizing) policies under that model, while E does not. Third, calculate the amount of money that one must take away from the rich under the normatively correct model to lower welfare from C to E.[200] Fourth, divide that money taken from the rich by the total income that parties earn when utility is maximized under the normatively correct model.

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[199] Note that, since spending on transportation for the rich increases tax revenues by more than spending on transportation for the poor, there is a slight decrease in tax rate when more is spent on the rich to achieve a consistent budget across scenarios.

[200] For example, suppose that society's true preferences are captured by $\lambda > 0$ but that policymakers erroneously allocate transportation spending between the rich and poor as if $\lambda = 0$ and $F > 0$. Starting from the optimal welfare level C, find the value A in

$$U_r = \quad \log\left(w_r L_r(1-\tau) - A - \frac{1}{k+1}(L_r + H_r)^{k+1}\right) - \lambda s \tag{10}$$

$$U_p = \quad \log\left(w_p L_p(1-\tau) + s - \frac{1}{k+1}(L_p + H_p)^{k+1}\right) - \lambda s \tag{11}$$

such that the maximized sum of the two utilities (10) and (11) equals welfare level E.