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Tax Fairness

Brian Galle*

Abstract

This Article argues that, contrary to the consensus of economists and many legal scholars, the norm of "horizontal equity" in taxation has independent meaning as a default rule in favor of existing arrangements. Although it has long been said, and widely thought, that tax should be fair in its dealings with individuals who are situated similarly to one another, no one has been able to say convincingly just what that fairness comprises. As a result, the learned referees in the last major dispute over the significance of horizontal equity judged that fairness's critic had decidedly won the day. Since then, there have been ever more critics, but no cogent, comprehensive defense.

My defense is both theoretical and practical. First, I argue that horizontal equity is a special aspect of the revenue function in taxation. Because it enshrines the status quo before enactment of a new tax law, horizontal equity can be reconceived as a commitment by the authors of tax legislation to honor the past and future policy choices of others, with whom they are jointly engaged in a project of deliberative democracy. Alternately, horizontal equity may be justified by welfare gains from a shared agreement to leave certain controversial questions of distributive justice undecided during the revenue-raising process. Both of these rationales leave open—indeed, they clear the air for—arguments about the ultimate ends law, and tax law in particular, should serve in society.

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I. Introduction

The concept of tax fairness is presently in some disrepute in the scholarly tax community. I do not mean that the tax system is unfair. I mean instead that most scholars would say that there is no distinctive principle of tax fairness. Most everyone agrees that society should care about distributive justice—a concept the tax community refers to as "vertical equity."[1] But there are very

1. *See* JOSEPH M. DODGE, THE LOGIC OF TAX 88 (1989) ("Fairness is also said to bear on the tax treatment of differently-situated persons. This issue is referred to as that of *vertical equity*."). There have been some prominent recent papers with titles similar to this one, but, unlike my effort here, each of those addresses the vertical equity question—how best to distribute the burden of tax across different economic strata of society. *See also* Linda Sugin, *Let the Beachcomber Drown: Why Taxing Endowment is Unjust* 1 (Feb. 29, 2008) (unpublished manuscript, on file with the Washington and Lee Law Review), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102370 (last visited Sept. 28, 2008) ("This article evaluates equity-driven claims that endowment is the ideal tax base; to the contrary, it argues that the protection of liberty and equality, as understood in liberal egalitarian political theories, prohibits a tax on endowment."). *See generally* James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1152–78 (2008) (arguing for a tax system based on equality of opportunity).

few who believe there is much to be said for "horizontal equity"[2]—the notion that a fair tax is one that treats similarly situated individuals alike.[3] This paper, in contrast, attempts to make a case for tax fairness. In particular, I try to suggest a handful of new, or newish, justifications for horizontal equity.

Scholarly opposition to horizontal equity (HE) takes many forms. Some commentators, most notably Professor Louis Kaplow, favor ignoring horizontal equity altogether, arguing that it serves no meaningful function in policy making and often conflicts with welfare, which these scholars see as the primary aim of tax policy.[4] Others, including Liam Murphy and Thomas

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2. There have been numerous doubters over the past few decades. *See* Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. PA. L. REV. 279, 363 (2006) ("Tax analysts sympathetic to welfarism and equity regard should . . . abandon traditional norms such as 'horizontal equity' . . . but not [the] further premise that egalitarians should embrace tax policies that make everyone better off ex ante.") (citations omitted); David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 87, 89 (2006) ("[H]orizontal equity may not be a proper goal of tax theory . . . . If . . . horizontal equity is a goal to strive for—a claim which has yet to be proven—then its normative grounding would be in direct conflict with that of vertical equity."); Thomas D. Griffith, *Should "Tax Norms" Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115, 1155 ("[H]orizontal equity cannot provide the answer to the proper tax treatment of personal injury recoveries or, in fact, to any other important tax policy question."); Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1193–94 (2008) (noting that horizontal equity has been criticized for "its lack of independent significance"); Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607, 612–13 (1993) ("HE will always merge into VE and will not survive as an independent normative criterion."); Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 87, 89–97 (1996) (reviewing criticisms of horizontal equity). There have been some defenders of horizontal equity, but with the exception of Richard Musgrave their efforts have been brief passages in longer works. *See* Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399, 451–53 (2005) ("This idea of fairness—which otherwise can be referred to . . . as horizontal equity—has considerable value in itself . . . ."); Kevin A. Kordana & David H. Tabachnik, *Tax and the Philosopher's Stone*, 89 VA. L. REV. 647, 662–63, 667–68 (2003) (claiming that "uniformity" and horizontal equity may have some role in tax justice arguments); John A. Miller, *Equal Taxation: A Commentary*, 29 HOFSTRA L. REV. 529, 536–40 (2001) (discussing the merits of the principle of equality as well as horizontal and vertical equity analysis); Richard A. Musgrave, *Horizontal Equity: A Further Note*, 1 FLA. TAX REV. 354, 354–59 (1993) [hereinafter Musgrave, *A Further Note*] ("HE has merit as a distinct norm, especially when it comes to ranking second best settings."); Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113, 113–22 (1990) [hereinafter Musgrave, *Once More*] ("HE not only emerges with a normative basis of its own, but one which is more firmly rooted than that of VE . . . . [I]t also has more popular appeal.").

3. *See* R.A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 45 (1967) (referring to horizontal equity as the principle that "people in equal position should pay equal amounts of tax").

4. *See generally* Louis Kaplow, *Horizontal Equity: New Measures, Unclear Principles*, *in* INEQUALITY AND TAX POLICY 75, 75 (Kevin A. Hassett & R. Glenn Hubbard eds., 2001) [hereinafter Kaplow, *New Measures*]; Louis Kaplow, *A Note on Horizontal Equity*, 1 FLA. TAX

Nagel, suggest that horizontal equity has no independent meaning other than as a placeholder for a more comprehensive set of moral norms.[5] A large set of economics literature essentially adopts this latter view, holding that "horizontal equity" as such has no meaningful content other than as an expression of a society's general tax norms.[6] The learned referees in the last major dispute over the significance of HE judged that fairness's critics had decidedly won the day.[7]

I suspect this consensus would be surprising to the lay public.[8] Scholars of equality more generally, of course, are long familiar with the problem of defining egalitarianism in terms other than some further moral claim.[9] Still, most of us probably think that it is important that laws that differentiate between us at least be justified with some significant moral or policy argument.

Professors Murphy and Nagel are well aware of this intuition, but they claim, in essence, that it is mistaken or illusory, an undue attachment to the things we happen to have won in the market but may not deserve.[10] In other words, the argument that equals must be treated fairly depends on an

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REV. 191, 192 (1992) [hereinafter Kaplow, *A Note*]; Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139, 139–50 (1989) [hereinafter Kaplow, *Search*].

5. LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 172 (2002).

6. *See* M. Bordignon et al., *Horizontal Equity in a Federal Context*, 4–5 (Nov. 28, 2005), http://www4.unicatt.it/Docenti/Bordignon/download/HI_teorico_FINALE.pdf ("[T]he requirement of HE can not be applied in any meaningful way until the concepts of 'equals' and 'equal treatment' have been more precisely defined."); Roberto Galbiati & Pietro Vertova, *The Principle of Horizontal Equity: Properties and Implications* 2 (Mar. 2005), http://www.unipv.it/websiep/wp/275.pdf ("[W]e conclude that the principle of HE is derivative, it is always respected and it is not a normative principle."); *see also* McDaniel & Repetti, *supra* note 2, at 613 ("[Musgrave] refers to the fact that [HE] reflects 'a basic premise of social mores . . . .'") (citations omitted). Auerbach and Hassett have proposed a model that is nearly as flexible, but that does assume comparisons will be based on individual welfare. *See generally* Alan J. Auerbach & Kevin A. Hassett, *A New Measure of Horizontal Equity*, 92 AM. ECON. REV. 1116 (2002).

7. *See* McDaniel & Repetti, *supra* note 2, at 612–13 ("[N]either Musgrave nor anyone else can respond to Kaplow's challenge on his terms.").

8. *Cf.* Musgrave, *A Further Note*, *supra* note 2, at 358 ("[T]he pervasiveness of the HE rule in the varying VE contexts suggests that HE is a primary principle, reflecting a basic premise of social mores . . . with which all people will (must) agree.").

9. *See, e.g.*, Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1218 (1997) ("Traditionally conceived, therefore, the supposedly prescriptive principle of equality is tautological and thus normatively vacuous."); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) ("Without moral standards, equality remains meaningless . . . .").

10. *See* MURPHY & NAGEL, *supra* note 5, at 30–32 ("[T]o the extent that market outcomes are determined by genetic or medical or social luck (including inheritance), they are not, on anyone's account, morally deserved.").

assumption that we each have come fairly to where we now stand.[11] Murphy and Nagel therefore assert that there is no *a priori* horizontal equality; we must judge everyone's entitlements and burdens according to a single theory of distributive justice.[12]

I want to defend here the notion that our accumulations of cash or contentedness, as they stand prior to being subjected to tax, should have some weight.[13] I begin with the idea that pretax distributions may be non-random, and, indeed, may be the deliberately chosen result of a perfectly just system of laws other than the tax laws. To disturb that distribution might then be an *in*justice, or, at a minimum, could imply that the moral judgment of the tax-law drafters is superior to the judgment of those who put in place the rest of society. HE, therefore, could represent the extent to which the tax system defers to explicit or implicit moral judgments made elsewhere in society or in government.

Put another way, suppose that we sit as lawmakers on a legislative committee with the authority to draft tax statutes, and we hold sufficient sway over our colleagues to obtain passage of whatever we enact. Let us posit that earlier this year, our colleagues enacted a farm subsidy bill whose distributive consequences we find appalling. Would it be legitimate or proper for us to enact a 100% tax on receipt of that subsidy? It is arguable, I claim, that the answer is no. If that intuition is correct, then it follows that there are constraints on tax legislation that do not arise purely out of distributive justice norms, but that instead depend on political theories, such as an obligation, again, to defer to the reasonable judgments of others.

Why would we want, or be obliged, to grant such deference? I suggest here two possible lines of thought. Both lines depend on one prior assumption. I assume that the Tax Code comprises not one, but in fact three distinct governmental systems or modes: raising revenue, redistributing wealth, and enacting other policy goals. Each of these modes might have its own set of rules or norms. My claims about HE for the most part are limited to tax's

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11. *Id.* at 32.

12. *See id.* at 30 ("[O]nce we reject the assumption that the distribution of welfare produced by the market is just, we can no longer offer principles of tax fairness apart from broader principles of justice in government."). This summary is a bit reductive. For a more complete explanation, see *infra* notes 48–60 and accompanying text.

13. As I will explain shortly, tax theory is fundamentally conflicted over whether its norms of fairness should take account for the measurable income and wealth of a taxpayer, or instead the taxpayer's subjective well-being, or "utility." For the early portions of this Article, I leave open the possibility that either or both might be of interest. However, in the last Part, I will argue that measurable wealth likely should be our foremost concern, at least in matters of horizontal (as opposed to vertical) equity.

revenue function, although the absence of HE can signal to us that we need to justify our tax decision by resorting to one of the other two modes.[14]

Turning, then, to the two possibilities, I argue that HE can be justified both by the unique purpose of the revenue function as well as on welfare grounds. In order for revenue-raising to serve its basic function, and to command widespread popular acceptance, it must be open to any reasonable view of good government. It follows, albeit along a twisty path, that the principles underlying the revenue function should give significant weight to pre-existing distributions of societal goods.

For those who find this form of deontological reasoning unpersuasive, I also roughly model the circumstances in which we can expect respect for HE to increase overall societal welfare. Taking as given the justice of existing arrangements can reduce the costs of deliberating about alternative rules, as well as the transaction costs and transition costs that attend the political process. At times, though, these gains may be swamped by the inefficiency of separating redistributive "corrections" from the revenue process itself.

One implication of the possibility that HE can be justified as welfare-enhancing is that the utility of HE in any instance will be subject to empirical testing. I believe that I am the first to suggest that tax fairness can be empirically grounded.

In any event, my point is not that HE is the only important tax value, or that it is more important than other norms. My only claim is that HE is more than its critics make it out to be—it embodies a respect for the hard work of governing done by our predecessors and fellow citizens. For the revenue aspects of taxation, at least, that respect should carry a fair amount of weight much of the time.

As for the roadmap of this paper, Part II describes in more detail the background and criticisms of HE. Part III sets out my theory that HE can be defended as an essential feature of the revenue function of taxation. Part IV argues that HE, understood as a default presumption in favor of the status quo in the design of an efficient revenue system, may increase overall

14. My method here is similar to the approach of neoclassical economics to designing the most efficient revenue-raising tax, which is simply to assume that the resulting distribution of incomes is just. *See* RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 71–87 (1959) (summarizing Wicksell and Lindahl). The difference between my effort and that model is that I actually attempt to explain why such an assumption could be defensible. In contrast, Professors Murphy and Nagel have called the assumption of fair distributions "utopian." *See* MURPHY & NAGEL, *supra* note 5, at 107–08 ("[W]e cannot argue about the tax base under the pretense that the opportunities presented in our actual, inegalitarian, market world are just and thus not to be disturbed through taxation. The fairness-to-savers argument as here reconstructed gets off the ground only in the equal libertarian's utopia.").

welfare. Part V then elaborates on these two claims to suggest that the proper measure of HE should be with reference to an individual's ability to pay her tax bill. I then conclude.

II. Background

In this introductory Part, I lay out the critiques of horizontal equity. Readers already familiar with this literature may safely skim.

The formal concept of HE has its roots in the literature of public finance economics. Indeed, some trace the notion of HE as a fundamental tax principle to John Stuart Mill, who opined that a tax system ought to demand an equal tax burden from taxpayers with equal capacity to contribute.[15] Twentieth century economists fleshed out that idea further, and Richard Musgrave gave the idea its current name.[16]

By the 1970s, however, critics began to circle. One strand of commentary argued that HE was fundamentally flawed in that it seemed to seriously mistreat families.[17] These scholars assumed, as the literature to that point had suggested, that HE demanded that two individuals with equal incomes be treated equally.[18] Yet different families, and especially different second-wage earners within families, might have different preferences for leisure or different child-care obligations.[19] The critics therefore asserted that it would be unfair to tax a family with four children and two working parents the same as a childless family, simply because both households have the same income.[20] The childless couple, even if they have identical household

15. Elkins, *supra* note 2, at 56.

16. *See* MUSGRAVE, *supra* note 14, at 160 ("Perhaps the most widely accepted principle of equity in taxation is that people in equal positions should be treated equally. This principle of equality, or *horizontal equity*, is fundamental to the ability-to-pay approach."); Elkins, *supra* note 2, at 57–58 (tracing the early development of the tax equality norm).

17. *See* Marilyn E. Manser, *Comparing Households with Different Structures: The Problem of Equity*, 69 AM. ECON. REV. 222, 222 (1979) (summarizing this critique).

18. Manser, *supra* note 17, at 223; Harvey S. Rosen, *An Approach to the Study of Income, Utility, and Horizontal Equity*, 92 Q.J. ECON. 307, 307 (1978); Zolt, *supra* note 2, at 87.

19. *See generally* Griffith, *supra* note 2, at 1158–59; Manser, *supra* note 17, at 223; Rosen, *supra* note 18, at 310; Clair Vickery, *The Time Poor: A New Look at Poverty*, 12 J. HUM. RESOURCES 27, 27–28 (1977); Zolt, *supra* note 2, at 89–90.

20. *See* Martin Feldstein, *On the Theory of Tax Reform*, 6 J. PUB. ECON. 77, 82–83 (1976) (discussing taste differences and horizontal equity); Manser, *supra* note 17, at 223 (noting "[s]uggestions for making welfare comparisons and considering tax equity on a basis other than income"); Vickery, *supra* note 19, at 27–28 ("[T]o base the benefit schedule of an income-support program on an index that defines poverty in terms of money income alone is to create gross inequities across households that vary in their number of adult hours.").

expenses, still has more leisure time.[21] On the plausible assumption that individuals value leisure, the no-child household is better off, in some sense, than the four-child home.[22]

As a result of these and other similar arguments, a split developed among theorists of HE. Some economists claimed in response that HE could be amended to deal with the leisure-time objection simply by changing the "equilisand," or the object of measurement, to utility.[23] If we reconceive HE to demand equal treatment of individuals with similar pretax well-being or utility, then we can apply HE to the family scenario and still arrive at the "right" answer.[24] Other theorists, however, continued to insist that HE should focus on "ability-to-pay."[25] That is, the gold standard for a horizontally equitable tax, in this view, is that two taxpayers with similar objective measures of financial capability to satisfy the government's demand for revenue should pay a similar amount of tax.[26] The ability-to-pay adherents asserted that "welfare" was usually unmeasurable, and that an individual's subjective happiness could not be divided up and distributed to others.[27]

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21. Richard A. Musgrave, *ET, OT, and SBT*, 6 J. PUB. ECON. 3, 7 (1976).

22. *See* Manser, *supra* note 17, at 223 ("If preferences differ, an income tax imposes a lesser burden on 'leisure lovers.'").

23. *See* Feldstein, *supra* note 20, at 77 (comparing tax design with tax reform); Manser, *supra* note 17, at 223 ("[A] tax on full income . . . will not satisfy the utility-based definition of horizontal equity if preferences differ . . . ."); Rosen, *supra* note 18, at 308 ("[W]e discuss the difficulties involved in implementing the utility definition of horizontal equity. These include the problems of measuring differences in 'tastes' . . . .").

24. *See* Manser, *supra* note 17, at 224 ("A straightforward extension of the utility-based definition of horizontal equity to the case of households requires that households who obtain equal utilities in the pretax situation should obtain equal utilities after the tax is imposed."); Rosen, *supra* note 18, at 309 ("The utility formulation of horizontal equity cannot be implemented unless comparable utility functions between families are postulated."); *see also* MURPHY & NAGEL, *supra* note 5, at 105–06 (raising this argument as well).

25. Somewhat confusingly, the tax literature uses the phrase "ability-to-pay" to mean two rather different things. The first, and the one I intend here, is used to distinguish resources available to pay tax—"ability-to-pay"—from other measures of a taxpayer's position in society, such as her utility. Rosen, *supra* note 18, at 307; Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867, 870 (2002). In its other sense, "ability-to-pay" is used to distinguish taxation based on the taxpayer's own characteristics, whether utility, wealth, or income, from taxation based on what the taxpayer receives from the government, or "benefit" taxation. MURPHY & NAGEL, *supra* note 5, at 20. As Professor Utz explains, the two meanings are related, in the sense that to invoke the first necessarily means that we have focused on the taxpayer, regardless of what she receives from the government. Utz, *supra* at 922.

26. *See* Utz, *supra* note 25, at 870–71 (describing ability-to-pay regime).

27. *See* HENRY C. SIMONS, PERSONAL INCOME TAXATION 42–43 (1938) (discussing the requirements for a "satisfactory definition of income"). Professor Stiglitz's argument that even a perfectly uniform lump-sum tax violates HE under a welfare view is a sub-species of the unmeasurability critique. Joseph E. Stiglitz, *Utilitarianism and Horizontal Equity: The Case*

Thus, they argued that a welfare or utility-based HE was unworkable in practice.[28]

To take another classic example of the difference that the choice between welfare and ability-to-pay makes, consider the HE analysis of tort payments for pain and suffering.[29] Suppose Castor and Pollux are identical twin brothers. Castor worked last year and netted $100,000. Pollux was disabled from an earlier auto accident and unable to work. However, he received a payment in settlement of his tort claim against the other driver in the amount of $100,000 to compensate him for his pain and suffering. Under an ability-to-pay rubric, Castor and Pollux are identical for tax purposes: Both have $100,000 in ready cash with which to pay a tax bill. Yet in a utility framework, it could easily be argued that Castor is roughly $100,000 better off than his brother.[30] Where Castor began the year at $0 worth of utility and gained $100,000, Pollux began $100,000 in the hole and climbed back up to $0 with the settlement payment. Proponents of a welfare-based HE therefore have argued that tort payments such as Pollux's should be excluded from income.[31]

Although the two theories converge in many cases, their stark divergence in other instances offered an opening for yet other critics to condemn the notion of HE altogether. This line of argument largely began in 1981 with Joseph

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for Random Taxation, 18 J. PUB. ECON. 1, 25–29 (1982). Stiglitz points out that, while we think of lump-sum taxes as the epitome of an equitable tax, the existence of different elasticities of supply for different goods (in his example, ice cream flavors) could result in disparate effects on superficially similar taxpayers even under such a uniform tax. *Id.* at 27. That is, if otherwise identical people have different tastes, the costs of paying tax will result in differential effects on the basket of goods they purchase after tax. One potential response to this claim is to say that the implication is not, as Stiglitz seems to claim, that there can never be a tax that satisfies HE, but rather that to satisfy HE fully a tax must account fully for the public's preference for all forms of consumption. Stiglitz's point is then still well-taken if we think such full information is inaccessible.

28. *See* SIMONS, *supra* note 27, at 11–12 ("[I]t is impossible in practice to take account of variations between different people's capacity for enjoyment . . . .") (citations omitted); William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 326 (1972) (noting this argument); Utz, *supra* note 25, at 939 (discussing the ability-to-pay approach); *see also* Michael L. Goetz, *Tax Avoidance, Horizontal Equity, and Tax Reform: A Proposed Synthesis*, 44 S. ECON. J. 798, 810 (1978) ("[W]hile defining horizontal equity in terms of utility eliminates some of the difficulties associated with the definitions of ability to pay, it creates a new set of problems as to how to define equal position when preferences and options differ."); Zolt, *supra* note 2, at 91 ("The use of utility based taxes would likely be more equitable . . . but clearly would be difficult (if not impossible) to administer . . . .").

29. The definitive treatment is by Griffith, *supra* note 2, at 1118.

30. For purposes of this example I put aside the likely disutility of sharing a name with an unpleasant-tasting oil.

31. Andrews, *supra* note 28, at 313. That is, they urge us to never mind the (income of) Pollux.

Stiglitz, and continues today with Louis Kaplow.[32] Stiglitz observed that the notion of HE, standing alone, does not seem to explain how we should determine when two individuals are in equal positions.[33] Although he accepted the notion that HE should compare individuals based on their welfare, he suggested that it was likely that at least some sources of welfare differences would be "inadmissible" for consideration in any functioning tax system.[34] In order to identify these inadmissible factors, we would need a "prior principle" to tell us what should count and what should not.[35]

Professor Kaplow has expanded on this account. Pointing to the pain and suffering example, he notes that HE is incoherent unless it tells us whether individuals such as our Castor and Pollux should count as "equal."[36] Kaplow then notes that we cannot know the basis for comparing two individuals without some underlying theory to explain why that basis is the right one.[37] Once we have that underlying theory, he claims, it is unclear what HE adds to our analysis.[38] For example, if we respect welfare as a measure of HE because our underlying value system tells us that welfare is important, then why not simply design a tax system that maximizes welfare, irrespective of HE?[39]

Indeed, Kaplow maintains that welfare should be the preeminent tax policy value, and that HE interferes with attainment of ideal societal welfare.[40] For example, he notes (echoing Stiglitz) that granting purely random

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32. *See* Kaplow, *A Note*, *supra* note 4, at 192 (discussing two problems with Musgrave's conclusion "that HE is of independent significance in the relevant sense"); Stiglitz, *supra* note 27, at 1 (discussing the ex ante and ex post horizontal equity of a random tax).

33. Stiglitz, *supra* note 27, at 27.

34. *Id.* at 25–27.

35. *Id.* at 27.

36. Kaplow, *New Measures*, *supra* note 4, at 19–20; *see also* Griffith, *supra* note 2, at 1157 (stating that horizontal equity does not resolve whether to treat three individuals with different wages and circumstances equally).

37. *Id.* at 20.

38. *Id.*; *see also* Adler & Sanchirico, *supra* note 2, at 362–63 (discussing points of agreement and disagreement with Griffith); Griffith, *supra* note 2, at 1155–56 ("The principle of horizontal equity cannot determine which differences justify different tax treatment.").

39. *See* Kaplow, *A Note*, *supra* note 4, at 193 (discussing "total welfare cost, HE, and 'vertical equity adjusted' (VEA)"); Kaplow, *New Measures*, *supra* note 4, at 20 n.30 ("Suppose, for example, that a tax deduction is undesirable because it implicitly subsidizes wasteful entertainment expenditures. The proper measure of the extent of the problem would be one that indicates the extent of inefficiency, not an index of HE.").

40. *See* Louis Kaplow, *A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism*, 48 NAT'L TAX J. 497, 499–502 (1995) [hereinafter Kaplow, *A Fundamental Objection*] (demonstrating "that tax equity norms are in fundamental conflict with the Pareto principle"); Kaplow, *New Measures*, *supra* note 4, at 9 ("[P]ursuing HE seems, at its core, to entail giving weight to morally arbitrary factors, at the expense of social welfare.").

improvements in well-being for certain individuals would violate HE but likely improve overall welfare: The lucky individuals are better off, and no one is worse off.[41]

This tradeoff presents a difficulty for those who favor welfare analysis but may wish to remain open to the claims of HE. Since HE, on Kaplow's view, is evidently not grounded strictly in welfare maximization, it is unclear how we might "trade off" greater faith to HE against losses in welfare, or vice versa.[42] That incommensurability seems to incline welfarists like Kaplow to reject HE altogether, except to the limited extent that HE stands as a placeholder for other values, such as an anti-corruption norm, that themselves increase welfare.[43]

For the most part, the economics literature has echoed the conclusions of Stiglitz and Kaplow. There is a branch of economics that still seeks to measure HE or "HI," the horizontal inequality, of various economies.[44] But these scholars now define HE not according either to welfare or ability-to-pay, but rather as a socially defined tautology.[45] "Equality," in this literature, is defined as the extent to which a society is able to administer a tax system that is consistent with whatever values the society chooses to define a just tax system.[46] So, if a given society concluded that in principle I, Professor Galle, should pay 100% of its taxes and no one else should pay anything, that society would be deemed inequitable only to the extent that its tax rolls (whether

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41. *See* Kaplow, *New Measures*, *supra* note 4, at 9–10 (arguing that HE is inconsistent with the Pareto Principle); Stiglitz, *supra* note 27, at 2. Of course, this example assumes that there are no disutilities for those who fail to win the random rewards. *Cf.* Elkins, *supra* note 2, at 53 (noting that perceived violations of horizontal equity may reduce utility if individuals are unhappy about those outcomes).

42. Kaplow, *A Note*, *supra* note 4, at 193; *see* Rosen, *supra* note 18, at 318 (discussing "the trade-off between individuals' 'utils' and horizontal equity").

43. *See* Kaplow, *New Measures*, *supra* note 4, at 2 ("[T]he notion of HE—a concern for equal treatment of equals—serves as a proxy device that enables us to identify factors that are potentially relevant to welfare."); *see also* Miller, *supra* note 2, at 539–40, 545 (arguing that horizontal equity is a check on political corruption).

44. *See, e.g.*, Jean-Yves Duclos & Peter J. Lambert, *A Normative and Statistical Approach to Measuring Classical Horizontal Inequity*, 33 CAN. J. ECON. 87, 88–90 (2000) (summarizing the horizontal inequity measurement literature); *see generally* Stephen P. Jenkins & Peter Lambert, *Horizontal Inequity Measurement: A Basic Reassessment*, *in* HANDBOOK ON INCOME INEQUALITY MEASUREMENT: FROM THEORY TO PRACTICE 535 (Jacques Silber, ed. 1999).

45. *Supra* note 6 and accompanying text.

46. *See* Auerbach & Hassett, *supra* note 6, at 15–17 (noting the attributes of the authors' "new measure of horizontal equity"); Bordignon et al., *supra* note 6, at 6–7 (discussing the importance of defining equals); Galbiati & Vertova, *supra* note 6, at 9 ("[T]he principle of HE is derivative, in the sense that it needs another principle that defines who the 'equals' are.").

through inadvertence or my successful bribes of their tax officials) included someone other than me.[47] This is, to say the least, not a robust theory of HE.

The philosophers Liam Murphy and Thomas Nagel reach conclusions similar to those of the economists, although their reasoning follows a slightly different path.[48] Murphy and Nagel's central claim is that the justice of a system of taxation cannot be determined apart from an overall evaluation of the justice of society as a whole.[49] Along the way, they contend that the concept of horizontal equity is indefensible.[50]

Murphy and Nagel's critique of HE rests on their view that there is no moral status to "pretax" distributions.[51] As others have noted, the concept of HE implies that we ought to preserve *after* tax the distribution of goods or welfare we found *prior* to the imposition of tax.[52] Murphy and Nagel argue that these pretax distributions are the product of "market" distributions that deserve little or no moral weight.[53] Under any attractive notion of distributive justice, they claim, the results of an unregulated market essentially will be arbitrary.[54] For instance, without government to protect property rights, the rewards individuals reap from their individual efforts will be the result of their happenstance ability to escape confiscation of the fruits of their labors by

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47. Bordignon et al., *supra* note 6, at 6; Galbiati & Vertova, *supra* note 6, at 5.

48. *See* MURPHY & NAGEL, *supra* note 5, at 13 n.3 (noting their agreement with Kaplow on the question of HE, but explaining that they arrive there for additional reasons as well).

49. *Id.* at 14–15, 25–26, 30, 39.

50. *Id.* at 38, 154–64, 172.

51. *Id.* at 30.

52. *See* Patrick B. Crawford, *Analyzing Fairness Principles in Tax Policy: A Pragmatic Approach*, 76 DENV. U. L. REV. 155, 177 (1998) ("What is missing from the formalistic uses of the nondiscrimination principle is an explanation of why the no tax world is the appropriate base."); Elkins, *supra* note 2, at 51 ("An argument could therefore be made that horizontal equity is rooted in this duty to preserve pre-existing equality."); Kaplow, *New Measures*, *supra* note 4, at 5 n.7 ("[A]ny approach to HE must privilege some distribution that will not exist once the system under examination is in place."); Zolt, *supra* note 2, at 96–97 ("If we are not certain of the fairness of the pre-tax distribution, then why is it so important to maintain either the ordering or the relative economic positions.").

53. *See* MURPHY & NAGEL, *supra* note 5, at 15 ("The assumption that pretax market outcomes are presumptively just, and that tax justice is a question of what justifies *departures* from that baseline, appears to flow from an unreflective or 'everyday' libertarianism about property rights."); *see also* Crawford, *supra* note 52, at 180 ("[T]he main problem with using the market as a foundation is that markets, even efficient ones, are not necessarily fair."); Kaplow, *New Measures*, *supra* note 4, at 1–2 ("To give weight to HE entails making policy judgments dependent on information (in the case of AH's index, pretax income levels) that has no bearing on any individual's actual well-being.").

54. *See* MURPHY & NAGEL, *supra* note 5, at 106 ("[N]o actual pretax distribution is the result of equal resources employed in the exercise of equal opportunities, and justice in taxation cannot simply be a matter of imposing equal burdens as measured against such a baseline.").

others.[55] More fundamentally, even if there is justice in transfers, the inputs of the market are generally inconsistent with attractive fairness norms: People simply do not compete on a fair or level playing field.[56] It follows that we cannot grant any moral authority to pretax distributions without a theory of distributive fairness, and therefore there can be no claim of HE apart from such a theory.[57]

Murphy and Nagel reject HE on a second ground, as well. In the abstract, government could correct the disparities we find in the market.[58] But, Murphy and Nagel say, we can only have government once we have taxation.[59] Thus, the only just distributions are those that exist in a world after tax.[60]

As I hope to show, this last claim overlooks the fact that lawmaking happens iteratively or simultaneously—that we can have laws that are both after some taxes but also before other taxes. Other than in the first year of civilization, this is the ordinary state of the world. Thus, I claim that the really interesting question is what ought to be the standards of justice for tax *reform*, rather than the first tax ever imposed by society.[61] I will also endeavor to show that, in this intermediate world, there are independent justifications for HE that do not depend, as all the critics seem to claim, on any prior theory of distributive justice. And, finally, I hope to show that HE can also be justified strictly on the grounds of welfare.

III. A Deontological Theory of HE

In this Part, I argue that HE offers a worthwhile contribution to tax policy as a default rule in favor of existing arrangements. It is a familiar point that the requirement that those who are alike before taxes ought to be left alike after taxes privileges pretax distributions of whatever equality is to be measured on, usually income or welfare.[62] As we have seen, a variety of critics take this to be one of the primary failings of HE; they argue that we must first determine

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55. *Id.* at 17, 33.

56. *Id.* at 68.

57. *Id.* at 38–39.

58. MURPHY & NAGEL, *supra* note 5, at 67–69, 106; *see also* Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 298 (1981) (discussing compensating individuals with disabilities out of a taxation fund).

59. MURPHY & NAGEL, *supra* note 5, at 32, 106–07.

60. *Id.* at 32–34, 36–37, 106–07.

61. *Cf.* Feldstein, *supra* note 20, at 77–78 (noting differences between ideal design of a new system and reform of an existing system).

62. *Supra* note 52 and accompanying text.

whether there is any moral desert in the pretax distribution before we can decide whether to honor it.[63]

My claim is that this position, and others like it, focuses unduly on the redistributive aspect of taxation while neglecting its revenue and regulatory functions. Once we situate the redistributive function of tax within a system of government with many other components, including some other tax-writing components, a stronger case for HE emerges. Similarly, once we see that tax law exists in the context of an ongoing government, in which what is pretax for us was after tax for our predecessors, it becomes easier to envision a meaningful concept of HE.

In both cases, it is possible to decide whether to honor existing distributions without considering the justice of those arrangements. Thus, HE can operate on principles of its own, and does not simply recapitulate an underlying theory of distributive justice.

A. Horizontal Equity as Deference

First, it is not necessarily the case that taxation, even in its pure redistributive mode, obliges us to determine the moral desert of existing distributions. Imagine a government much like that of the United States, in which initial authority for drafting legislation is divided among committees of a legislature. Suppose we sit on the redistributive taxation and social justice committee. There exist other committees with more mundane portfolios, such as health care, the environment, and public works. Because of vote-trading and imperfectly stable coalitions, it is theoretically possible for there to exist inconsistent legislation—that is, there can be passed two laws whose purposes and effects cannot be entirely reconciled.[64] Alternatively, it may be that legislation must actually be implemented by an executive branch, elected apart from the legislature, which may bring the law into effect in ways not entirely reconcilable with legislative aims.[65]

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63. *Supra* notes 51–60 and accompanying text.

64. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425–37 (1988) (surveying literature on the possibility of inconsistent legislation, but arguing that it is often still possible to construct a general consensus meaning for statutes). For an extensive theoretical discussion of vote trading, see generally JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

65. For one classic statement of this point, see Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614 (1927) ("Hardly a measure passes Congress the effective execution of which is not conditioned upon rules and regulations emanating from the enforcing authorities. . . . [T]he manifold response of government to the forces and needs of modern society[] is building up a body of laws not written by legislatures . . . .").

In this hypothetical, a central question for us, as members of the redistribution committee, must be what respect we owe the distributive effects of laws enacted or implemented by our fellow public servants. Obviously, many laws other than redistributive taxes or direct government grants to the indigent will have distributive consequences.[66] One often reads that the perfect design of one field of law or another ought to neglect distributive effects, and leave any distributive imperfections that result to the tax system.[67] But it is hardly the case that this is the only view of law reform in any particular field.[68] Suppose, then, that our fellow lawmakers took the opposite view. Indeed, let us

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66. *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994) (comparing an inefficient legal rule designed to have redistributive effects to an efficient legal rule).

67. *See id.* at 677 ("[I]t is appropriate for economic analysis of legal rules to focus on efficiency and to ignore the distribution of income in offering normative judgments."); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 107 (4th ed. 2004) ("Many economists believe that progressive taxation and social welfare programs . . . can accomplish redistributive goals in modern states more efficiently than can be done through modifying or reshuffling private legal rights."); Lior Jacob Strahilovitz, *Wealth Without Markets?*, 116 YALE L.J. 1472, 1509–11 (2007) (discussing Kaplow & Shavell's argument that redistribution should come through taxation, not legal rules); David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 446–53 (2003) (analyzing whether redistribution should be accomplished through legal rules); *see generally* LOUIS KAPLOW & STEVEN SHAVELL, THE EFFICIENCY OF THE LEGAL SYSTEM VERSUS THE INCOME TAX IN REDISTRIBUTING INCOME (1993).

68. *See* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 508 (1980) ("This question is an empirical one which must be resolved on a case-by-case basis, in the light of detailed information about the circumstances likely to influence the effectiveness of each method of redistribution."); Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 331 (2006) (critiquing Kaplow and Shavell's position on redistribution through tax policy); Richard S. Markovits, *Why Kaplow and Shavell's "Double Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511, 550–55 (2005) (same); Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1748–90 (2005) (arguing that human perceptions of different structures for redistribution may make it more efficient to redistribute through the use of substantive legal rules); Brett McDonnell, *The Economists' New Arguments*, 88 MINN. L. REV. 86, 111 (2003) (pointing out that it may be easier to enact redistribution through judicial rules than through tax legislation); Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1006–11 (2001) (offering "an alternative perspective on redistributional policy, one opposed to the tax-centric view of" Kaplow and Shavell).

This debate should not be confused with the somewhat similar dispute over whether some regulatory aims, such as pollution control, are better carried out through a Pigouvian tax rather than direct quantity or other behavioral rules. *See* JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 138–46 (2d ed. 2007) (summarizing this debate); Louis Kaplow & Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 AM. L. & ECON. REV. 1, 3–6 (discussing corrective taxes and quantity regulation). The first is a question about redistributive tools, while the second is about the choice of regulatory tools other than those intended solely to bring about redistribution of wealth.

posit that their bill or regulation on its face declares that it is their view that the regulation reaches a *perfectly* just distributive outcome. We have the power to enact a law inconsistent with that judgment. Is it the case that our own committee must now formulate its own complete theory of justice in distribution in order to determine whether we shall, with our own bill, either preserve or unwind the distributive effects of that other law?

The answer is quite plausibly "No." We might, for example, determine that we must defer to the judgment of our fellow public servants. There exist a number of grounds on which we might do so. Perhaps we might conclude that we owe the public a system of laws that is internally coherent, and that therefore we will follow the views of those who have acted before us, regardless of our own personal agreement.[69] Or perhaps we believe the other committee has an epistemic advantage over us—that is, we have reasons to think that their judgment in this particular is superior to our own.[70] The opposite could also be true: We might presume we have a clear epistemic advantage on distributive matters over our fellows, and therefore determine that we can safely ignore their judgment. All of these grounds would be for the most part content-independent.[71] Each ground would dictate our decision, regardless of what we thought of the actual content of the other committee's law.[72] It therefore appears that we could carry out our duty as the redistribution committee, at least as to this issue, without our own overarching theory of justice in distribution.

There are at least two immediate potential objections to this reasoning. First, it might be argued that the decision to defer was not truly content-independent. There must be some grounds for believing that we have a duty of

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69. For some samplings of this form of argument, see RONALD DWORKIN, LAW'S EMPIRE 176–86, 217–18 (1986) (discussing the political integrity principles of "integrity in adjudication and integrity in legislation"); JOSE MARIA MARAVALL & ADAM PRZEWORSKI, DEMOCRACY AND THE RULE OF LAW 96 (Cambridge University Press 2003) (describing official deference to other officials as a form of the rule of law). For a comprehensive effort at justifying a coherentist account of tax interpretation, see generally Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71 (1996).

70. I have in mind here the sort of argument advanced by Jeremy Waldron, in his claim that representative government is epistemically superior to courts in identifying fundamental human rights. JEREMY WALDRON, LAW AND DISAGREEMENT 296–301 (1999).

71. A content-independent reason is, as the phrase implies, a reason for doing something based on the source of the reason, rather than the persuasiveness of the content of the reason. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 35–37 (1986) (discussing content-independent reasons); Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1618 (1991) (discussing content-independent and exclusionary reasons in the context of practical authority).

72. *See* RAZ, *supra* note 71, at 35 ("A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason.").

coherency, or a duty to defer to a lawmaking body with epistemic advantages over us. In other words, there has to be some account of an official's obligations to her constituency to explain why we should not simply do as we wish, according to our own preferences. This account itself likely depends on moral claims about the form of a just government and an official's role within it.

I think this objection is right, to a point. Rules of deference have underlying justifications.[73] But it is not necessarily the case that these justifications turn on questions of distributive justice. For example, suppose our committee were more judicial than legislative—we were appointed and serve with life tenure. Our decision to defer to the judgments of other servants might well turn on notions of representative democracy, irrespective of the distribution of welfare or whatever else that might result.[74] Alternatively, we might believe, as Jeremy Waldron also suggests, that our fellow public servants deserve deference because they are more diverse and deliberative than are we.[75] Here, again, while there are value judgments of a sort, there is no evident need to revisit the *distributive justice* judgments of our colleagues.

Both of these examples lead us nicely to the second likely objection, which is that exercising our distributive justice judgment is inevitable. For example, suppose that our colleagues ask us to defer to a result that in our view is extreme and outrageous. At some point, this objection would go, there is a need to trade off the values that underlie the claim for deference against what we perceive as serious distributive wrongs.[76] Similarly, one might argue that we cannot evaluate claims of epistemic superiority without knowing what ends this superiority is said to be in service of.

Again, I think this argument is right, but only to a point. Any attractive theory of government likely permits our own distributive judgments to set an outer bound on our degree of deference to the judgments of others.[77] Under a

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73. That is, we do not blindly accept some sources of authority as binding; even content-independent reasons for obeying the law are dependent on an account of law that justifies our duty to follow it. *See* Hurd, *supra* note 71, at 1615–20 (presenting reasons for following authority).

74. *See, e.g.*, WALDRON, *supra* note 70, at 264 (examining whose judgment controls in a government). Obviously, these are highly controversial propositions, and it is not my aim to explore their persuasiveness fully here. My only point is that it is possible to formulate such claims.

75. *See id.* at 54–55 (discussing "the preference for large legislative assemblies").

76. *See* DWORKIN, *supra* note 69, at 203 (discussing conflicts with justice).

77. *See* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 765–68 (1997) (arguing that "a theory of judicial restraint in the administrative state" is necessary to limit agencies' discretionary authority); David B. Spence & Frank B. Cross, *A Public Choice Case for the Administrative*

fairly vigorous view of deference, however, the space within these outer bounds may well be quite large. In many cases it will be obvious that the situation is well within those borders, occasioning no need for us to give any careful or detailed consideration of its justice. This is not to say that we cannot adopt a weak view of deference and a strong view of redistributive justice's constraints upon it. My point is that the opposite is also a plausible view, and that in such a scenario our independent judgment often proves unnecessary.

Another version of this second objection might more closely follow Professor Dworkin's claim that our own assessments of distributive justice are necessary even in identifying the content of the existing distribution.[78] Dworkin argues that interpretation, properly understood, obliges the interpreter to make sense of the world in light of her own understanding of what best "fits" the available "text" to her own sense of the just outcome.[79] We cannot read without assumptions about what text is, how language works, and why we are reading.[80] In Dworkin's view, these assumptions boil down to the question "what is the 'best' reading of this text?"[81] Thus, the very process of determining the content of the law to which we owe deference requires us to decide what we think is the best result.[82]

This is a powerful argument, but it is not the only possible view of the interpretative process. We can imagine many more modest approaches. Without getting too deeply bogged down in interpretive theory, suffice it to say that many commentators believe that interpretation can be freed, at least in part, from the subjective preferences of the interpreter.[83] Additionally, as I hope to

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State, 89 GEO. L.J. 97, 106–15 (2000) (suggesting that decisions whether to delegate lawmaking power depend on expected degree of divergence between results preferred by delegator and delegatee).

78. *See* DWORKIN, *supra* note 69, at 48–53 (explaining the interpretation of social values and practices as a twofold process, requiring a determination of why these institutions exist, and also, what they require); *see also* Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958) (claiming that interpretation of a legal rule involves hypothesizing its desired outcome).

79. *See* DWORKIN, *supra* note 69, at 47 ("People now try to impose *meaning* on the institution—to see it in its best light—and then restructure it in the light of that meaning.").

80. *See id.* at 46 (asserting that disagreement results from the differences in criteria people use in forming their interpretations).

81. *See id.* at 225–58 (suggesting that judges assign laws an interpretation that produces a result they believe best fits with the community's goals).

82. *See id.* at 256 (claiming that a determination of how to interpret a law reflects one's views on justice and fairness, and also represents one's "higher-order convictions about how these ideals should be compromised").

83. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608–15 (1958) (defending the view that law and morality can be separated in legal interpretation). For a survey of the many disputes over this and related issues, see Frederick

show a bit later, the very fact of the need to defer to others may limit the grounds on which we can assert our own preferences.

I devote so much attention to this redistribution committee hypothetical because it is generalizable. The central lesson is that one can formulate redistributive tax policy in the absence of overarching theories of distributive justice. Instead, it is possible to substitute a relatively content-independent reason for deferring to the arrangements created by other actors, based not in redistributive justice but rather in a theory of government organization.[84]

The first way to generalize deference is to extend it to include not only the precise policy outcomes selected by other legislators, but also all of the distributions of tangible and intangible goods in society that might potentially have been affected by such policies. Suppose we live in a society in which law is longstanding and pervasive. All existing entitlements came about in the context of laws enacted by our predecessors and are subject to redistribution each year by our contemporary lawmakers. In this world, which looks much like our own, it is plausible that the income each individual receives—the sum total of her wealth, and any utility she derives from either—are the result of interactions between her efforts and a policy regime constructed by lawmakers to whom we owe deference.[85] In this scenario, if we owe deference to the work

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Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. (forthcoming 2008) (manuscript at 3 n.9, on file with the Washington & Lee Law Review). For example, we might begin only with some limited assumptions about the semantic dimensions of the text—what language it is in, where it begins and ends. From these assumptions we get a first read. Perhaps the text now tells us more—it implies whether it ought to be read literally or metaphorically, whether it should be understood as law or guideline. We can repeat this process many times, each time allowing the text to guide us, rather than the reverse. Professor Dworkin, too, recognizes the necessity of this sort of "iterative" engagement with a text. *See* DWORKIN, *supra* note 69, at 250 (discussing the judicial application of precedent as applying previously established principles to the facts of the present case). But he asserts that inevitably each round, and ultimately our summation of the results of the rounds, must result from our own assumptions about the "best" result. *See id.* at 250–54 ("[J]udges . . . decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."); *see also* Christopher Wolfe, *John Marshall & Constitutional Law*, 15 POLITY 5, 14 (1982) (arguing that constitutional interpretation necessarily involves "the interpreter's personal, subjective views of policy"). As others have argued, this claim seems to depend either on a psychological assumption about how we read, or a controversial judgment about how we ought to read. *See* McCaffery, *supra* note 69, at 99 (claiming that there is an "unavoidably political dimension of interpreting tax" which encompasses philosophical, moral, and personal judgments); David Weberman, *A New Defense of Gadamer's Hermeneutics*, 60 PHIL. & PHENOMENOLOGICAL RES. 45, 63 (2000) (finding that valid statutory interpretation requires assigning the text relational and intrinsic properties).

84. *Supra* notes 69–72 and accompanying text.

85. *Cf.* Kaplow, *New Measures*, *supra* note 4, at 20–21 (arguing that tax and other law affects market values); Sanchirico, *supra* note 68, at 1052 (observing that private law may have

of our colleagues, it seems to follow that we also owe deference to the results that work brings. To redistribute away from the results we find before our tax work begins would be to assume that our colleagues have chosen wrongly. If we must defer to the presumptively correct choices of our colleagues, we should not enact any redistributive tax.

It should not matter that some of these choices were choices not to act. That is, we might also owe deference to arrangements that were left deliberately in place unaltered by our fellow lawmakers. Whatever theory of government it is that gives our colleagues a claim for deference to their enactments also should give them a claim for deference to their considered choice not to pass a law. After all, the decision not to pass a bill can be reformulated simply as an enacted law proclaiming, "leave matters as they stand." Of course, it may be the case that our theory of deference itself requires a positive enactment before deference is triggered. The world is large and most legislatures small. Therefore, we may want evidence that our colleagues have in fact engaged their superior epistemic ability before we yield up our own judgment. Still, we can imagine deference theories that oblige us to step aside for action and inaction alike.

To put this point a slightly different way, it is possible that the laws put into place to govern society prior to the effect of this year's tax are perfectly distributively just across all results. That is, the laws may control the distribution and exchange of property and entitlements perfectly not only for one policy area, but for all of them. Once again, then, in order to justify any redistribution by the tax system, we first would have to demonstrate the imperfection of the work of our legislative colleagues. Our theory of deference might prohibit us from entering that inquiry, or it might limit the grounds on which we can attempt to claim an imperfection.

Therefore, subject to some further exploration of whether any of these assumptions are plausible, it may be that, contrary to Kaplow, Stiglitz, Murphy and Nagel, there are grounds, independent of our theory of distributive justice, for honoring pretax arrangements in our allocation of tax burdens. Many decisions about whether to impose a redistributive tax may rest, not on a theory of distributive justice, but instead on a theory of whether or not to defer to other government decisions. Horizontal equity therefore could embody a principle of respect for the arrangements set out by these prior government choices. This regard might also extend, depending on our theory of deference, to extra-governmental decisions as well.

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pervasive effects on the distribution of goods in society).

At this point it seems obvious that much depends on what exactly constitutes our theory of deference. We are asking an awful lot of any theory. Is there any conceivable theory that could meet our demands? I take up that question next.

B. Finding a Plausible Account of Deference

In the abstract, this account may have some appeal, but there is a strong argument that, if we view the goal of the tax system exclusively as one of redistribution, in reality we will be unable to find a theory of deference that offers anything but a very weak role for horizontal equity. On a different set of assumptions about the aims of taxation, however, the presumption in favor of existing distributions may be stronger.

1. Holes in the Theory

To begin with the weakness of HE under a purely redistributive tax regime, we saw in the last section that the argument for deference may require some fairly heroic assumptions. On close inspection most of the potential grounds for deference by the tax-drafter to other officials seem weak. For example, I suggested the possibility that other officials have epistemic advantages over the tax-drafter.[86] This presumes, though, that the other officials account for the distributive consequences of their own activities. As I mentioned, this is a controversial proposition; in many areas of law, it is thought that redistribution should instead be accounted for through the tax system.[87] Further, the epistemic advantage claim may be unpersuasive to tax-drafters who believe that their own theory of redistribution may greatly diverge from the theories of other officials. I noted that deference will typically be bounded by the need to avoid highly unjust results. If our tax-drafters have relatively little grounds for agreement with other officials this space may prove narrow or non-existent.[88] In short, the epistemic advantage account assumes that other officials in fact apply a theory of redistribution when they act, and that such a theory accords relatively well with the tax-drafter's own.

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86. *Supra* notes 69–70 and accompanying text.

87. *Supra* note 68.

88. *Cf.* Spence & Cross, *supra* note 77, at 106–15 (suggesting that the decision to delegate authority to others partly depends on the likelihood that the others will produce outcomes to which the delegator would be indifferent).

The consistency argument has similarly formidable assumptions built into it. Recall that I also proffered, along the lines suggested by Professor Edward McCaffery, that there might be an obligation for tax-drafters to create a set of tax laws that is coherent in principle with existing law.[89] To accept that claim we must accept some account of legislative obligation to set aside personal preferences for principled coherence, such as Professor Dworkin's theory of integrity.[90]

In addition, even Dworkin would not oblige legislators to maintain pure consistency in mere "policy" outcomes. For example, Dworkin asks at one point whether a legislature would be obligated to leave in place the distributive consequences of a subsidy for farmers enacted by an earlier legislature.[91] Dworkin explains that his theory of principle is open to the claim that individual enactments can be inconsistent on many policy particulars, so long as they can be strung together coherently to further some underlying theory of justice.[92] Thus, our tax-drafting committee might enact a tax on the very subsidies put in place by the farm committee.[93] This would obviously create a policy conflict, and perhaps even a conflict on notions of distributive justice. But so long as our tax-drafters harmonize the two acts on some other axis, they will satisfy the demands of integrity in legislation.[94] As a result, integrity or principled coherence of some other sort requires tax-drafters to defer on questions of distributive justice only to the extent that there are not other principled ways of reconciling their work with the enactments of others.

Finally, any theory of deference must address the question of legislative omissions. As we saw, in order to extend HE to include market allocations left in place or only indirectly brought about by government action, we had to assume that these outcomes were deliberate choices to which we owed respect

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89. This is not precisely Professor McCaffery's argument. As I understand him, his claim is the more limited one that tax law should be *internally* coherent. McCaffery, *supra* note 69, at 81–83, 96, 114.

90. *See* DWORKIN, *supra* note 69, at 95–96, 177–276 (viewing integrity as an essential political virtue, and claiming that the legislative component of "political integrity" requires lawmakers to make the laws as "morally coherent" as possible).

91. *Id.* at 221–23.

92. *Id.* at 222–24.

93. For a recent real-world example, see William Neuman, *Mixed Signals: Driving to Work as a Tax Break*, N.Y. TIMES, Aug. 16, 2007, at B1 (describing the mixed messages the government sent to drivers when the Department of Transportation allocated funds to cities' efforts to deter people from driving, while Congress offered drivers a tax break—allowing them to use pretax wages to pay for parking costs at work).

94. *See* DWORKIN, *supra* note 69, at 219–23 (suggesting that legislative integrity requires pursuit of a broad conception of coherency, not necessarily the narrower concept of internal consistency).

under our theory of deference.[95] In reality, though, legislative inertia is widespread, and the problems of the world are far larger than legislative attention.[96] It is highly implausible that any of the theories we have seen so far would require the tax-drafter to defer in the absence of some evidence that there is another affirmative legislative act to which she ought to defer.

The best argument on this front, as David Elkins has noted, is probably Robert Nozick's theory of justice in transfers.[97] Nozick argued, famously, that redistribution cannot be justified if we assume that the initial acquisition of resources is just and that each subsequent transfer is also just.[98] With a bit of transposition we could apply a similar argument to the question of deference to market distributions. If there is a set of laws governing transfer, why shouldn't we presume that those laws embody a choice about the ideal distribution of goods in society, to which we owe deference? To the extent we fear that initial acquisitions in the past may have been unjust, we might assume the laws of transfer account for them. For instance, perhaps our laws governing contract are so protective of less wealthy or powerful parties that they have achieved perfect redistribution of initially unjust states.

An important implication of this theory is that the evidentiary significance of legislative inaction is much reduced. If there is one set of general rules governing transfers, then the fact that the legislature has not specifically regulated a given field—say, housing or securities—does not signify that the resulting outcomes are the result of inertia rather than legislative choice. The legislative choice is simply present at a higher level of generality.

While this argument is certainly a theoretical possibility, it also sets us back at the same place we began this section. Once more, our theory of deference depends on the assumption that some other set of laws has already functioned perfectly to achieve our own notion of distributive justice. If those laws were imperfect, either in execution or, from the tax-drafters' perspective, their conception of justice, then the case for deference to them is much weakened.

At this point the reader may well complain that I have led her in a circle. I began by contending that there is a view of HE under which it may have

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95. *Supra* notes 68–82 and accompanying text.

96. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 91–119 (1982) (discussing legislative inertia); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1524–25 (1987) ("[L]egislative inertia means that only occasionally and adventitiously will Congress respond to judicial statutory interpretations at odds with original intent or purpose.").

97. Elkins, *supra* note 2, at 74–84.

98. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 152 (1974).

meaning independent of our general view of distributive justice. We now see that in practice a tax system dedicated entirely to redistribution is unlikely to fulfill any of the conditions in which that possibility is true. Our efforts thus far are not in vain, however. As I will now show, a tax system engaged in projects other than simple redistribution may well be able to satisfy many of the conditions necessary to give HE some value as a stand-alone principle.

2. Plugging the Holes: HE and the Revenue Function of Taxation

So far, I have shown that HE has some intuitive appeal as a form of respect for the existing choices of governments and markets. On first inspection that intuition was hard to justify as to the entire tax system. Put another way, while assignment to the revenue committee may not *require* us to do distributive justice, on what grounds are we thereby prohibited from doing so? In this section I develop some arguments for why there may be something unique about tax's role as a source of revenue for all other government projects. In particular, I argue here that, because the sole purpose of revenue is to make possible a flourishing deliberative democracy, and because it is possible that allowing the revenue system to make its own policy judgments would interfere with deliberations elsewhere, the revenue process should simply accept as given any reasonable policy choice. That is, it should respect existing distributions. I should note that another set of arguments—for many readers, likely the more important set—is focused on outcomes. Perhaps separating revenue from redistributive functions enhances overall social welfare. I reserve the particulars of that claim for the next Part.

It is no great insight to observe that a tax system can serve several different functions.[99] Most obviously, taxes raise revenue for government services.[100] The structure of a tax system can also serve a regulatory function, as with the classic Pigouvian tactic of imposing a tax on activities that give rise to externalities.[101]

The fact that taxation is multi-functioning is significant for my argument here because it is conceivable that horizontal equity has a different meaning for

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99. *See* MURPHY & NAGEL, *supra* note 5, at 76–77, 94 (claiming that taxation has two functions: determining the amount of individual resources allotted to the government and distributing social product among individuals); Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3 (2006) (acknowledging the revenue-raising function of taxation, but noting that modern countries also impose taxes for redistributive and regulatory purposes).

100. *See* Avi-Yonah, *supra* note 99, at 3–4 (acknowledging that "a government that cannot tax cannot survive").

101. GRUBER, *supra* note 68, at 140.

each of tax's different functions. To return again to our legislative committee example, suppose that there is not one but three tax writing committees: one for revenue, one for regulation, and one for redistribution. How does our deference analysis change if we sit on the revenue-raising committee, such that our task is simply to bring in funds, rather than to achieve a just distribution of societal resources? Is there something unique about revenue that commands special deference to outside policy judgments when we are engaged in writing revenue laws?

a. Promoting Deliberation

The first, and for me the most powerful, argument in favor of deference is that there is something unique to the task of raising revenue for society at large that imposes obligations on those who engage in it to refrain from making certain value judgments. That is, the fundamental task of the revenue function is incompatible with selecting a single, contestable theory of redistributive justice. I want to contend here that revenue plays a crucial role in guaranteeing a society in which citizens can, and have reason to, debate and reason with one another over the best ends for society to pursue. Moreover, those who write and implement the rules for raising revenue must be neutral as between reasonable ends—must strive to leave in place the pretax distribution they find—in order to be consistent with this vision of a deliberative or "republican" society. That argument proceeds in a few steps.

First, it is worth clarifying why fair and open deliberation should be our touchstone. This ground has been well tread by modern republican theorists, so my summary here is brief.[102] Deliberation is central to democratic self-government, the process by which individuals partake in choosing the best course for their lives and the institutions that affect them.[103] In this sense, self-governance is what gives our lives as human beings meaning; we define who we are and who we aspire to be by partaking in debates about what ought to be

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102. *See, e.g.*, Richard H. Fallon, Jr., *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1721 (1989) ("Republicanism calls for a deep and ongoing political dialogue through which we open ourselves to others, shape and are shaped, and experience an enriching and ennobling integration of self and community."); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17–55 (1986) (noting that "[r]epublicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion"); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–58, 1564–76 (1988) (describing active participation and "collective self-determination" as fundamentals of republicanism).

103. *See* Michelman, *supra* note 102, at 27–35 (describing "direct participation . . . in the determination of common affairs" as central to republican citizenship).

done with our shared resources.[104] Deliberation binds communities together in shared projects, whose bonds are the tighter for having been fashioned by each participant, rather than being forced upon us.[105] And, as more practical advocates of republicanism have shown, free and open deliberation among equals is epistemically powerful—it is better than any alternative at finding shared problems and crafting solutions.[106]

Revenue is tied to deliberation because revenue is a primary good; it is necessary to any form of government in which the public's preferences can be fairly and openly debated and implemented.[107] In this respect, we might think of the revenue function as akin to the structural features of the U.S. Constitution, in that it is designed to promote deliberative self-governance without pre-selecting against any given reasonable outcomes except those inconsistent with deliberative self-governance.[108] For instance, the Constitution prohibits limitations on political speech, regardless of the character of the speech.[109]

Revenue can be a primary good in both a strong and a weak sense. In the weaker sense, revenue is primary because we cannot have a deliberative democracy without institutions that make both deliberation and democracy

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104. My formulation draws on the Deweyan notion of deliberative democracy as a central human virtue. *See* 1 COLLECTED WORKS OF JOHN DEWEY: THE EARLY WORKS 248 (Jo. Ann Boydston ed., 1967) (arguing that democratic participation is an ethical ideal embodying the norm of self-actualization); 11 COLLECTED WORKS OF JOHN DEWEY: THE LATER WORKS 218 (Jo. Ann Boydston ed., 1981) (describing democratic participation as part of the "truly human way of living"). It also draws on the more modern Habermasian reinvention of it. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 287–328 (William Rehg trans., MIT Press 1996) (1992) (discussing the importance of the public sphere in housing public discourse); 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 273–337 (Thomas McCarthy trans., Beacon Press 1984) (1981) (claiming that the communicative power of public discourse legitimizes the democratic process); *see also* HANNAH ARENDT, ON REVOLUTION 115 (1963) (emphasizing the importance of public spaces for citizens to engage in open discussion); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 10 (1988) ("The republican tradition insisted that people are social beings who draw their understandings of themselves and the meaning of their lives from their participation with others in a social world that they actively and jointly create.").

105. DWORKIN, *supra* note 69, at 168–72; Sunstein, *supra* note 102, at 1569.

106. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1529–30, 1533–36 (1992).

107. *Cf.* John Rawls, *The Idea of Public Reason Revisited*, *in* THE LAW OF PEOPLES 131, 139–40 (1999) (explaining that the author's view of democratic deliberation requires that the public be able to follow public reason "free from the curse of money").

108. *See* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 63–71, 260–61 (1999) (suggesting that the "underlying commitments" of the American Constitution allow for flexibility in interpreting constitutional rights).

109. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

possible. To have democracy, we must have voting booths—or at least urns to hold the Athenians' black and white stones—and an army to preserve democracy against conquering tyrants. To have meaningful deliberation, we need a society in which individuals can develop the capacity for reasoned judgment.[110]

But, this is the weak conception because it tells us very little about the shape of the revenue function. Any tax system that results in a society that could vote and deliberate seems to satisfy this test. To be sure, if we tax individuals so heavily that they cannot participate in self-governance, we are undermining the goal of promoting deliberation.[111] We can avoid that accident, though, through many different mechanisms, including the simple one of exempting from taxation the amount of money needed to achieve a reasonable level of participation in republican government. This is one common explanation for our own tax system's "zero bracket," in which the first $8,000 or so of income ($13,000 including the standard deduction) is not taxed.[112] Once we have a zero bracket, any other tax design is compatible with the weak conception of revenue as a primary good.

It is the stronger conception, then, that demands that tax's revenue function strive to leave in place the *status quo ante*. The strong conception begins with the assumption that, to be meaningful and worthwhile, deliberation must involve a debate over achievable ends.[113] It might be entertaining to contemplate the hypothetical rules for breeding unicorns or extorting gold from leprechauns, but it is not republicanism in its fullest sense.

Therefore, if revenue is to be consistent with free, open, and meaningful deliberation, the rules for raising revenue must not close off outcomes that reasonably could be chosen in the deliberative process. A guarantee of free and open debate about the just ends of government is pointless if many of the potential ends under discussion are already impossible given our choice of a revenue scheme. Society should be free to deliberate about any ends within its

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110. *See* McDaniel & Repetti, *supra* note 2, at 609–14 (claiming that the goal of the tax system should be to develop potential for individuals to participate in self-governance); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands From Tax Systems*, 72 FORDHAM L. REV. 1991, 1993, 1999 (2004) (arguing that a Rawlsian view of justice would demand a tax system capable of supporting public institutions that could defend Rawlsian values, such as equality of opportunity, education, and economic regulation).

111. *Supra* notes 102–06 and accompanying text.

112. *See, e.g.*, DODGE, *supra* note 1, at 117 (claiming that an allowance adequate to meet an individual's basic needs for subsistence must be excluded from taxation, as such a need takes priority over the needs of the government).

113. *See* Sunstein, *supra* note 102, at 1569 ("Republican thought . . . sees political liberty in collective self-determination.").

means, not only those left open by the choices of those who write and enforce the revenue laws.

An example may be helpful here. Some libertarians argue that the only just tax is one that imposes absolute equality of tax burdens among all individuals—a head tax.[114] Simple economics demonstrates that the head tax alone can fund only a very limited amount of government services.[115] Our commitment to a libertarian philosophy of revenue, and therefore the head tax, closes off any possibility of later policy choices requiring substantial funds. If the public or (returning to my committee hypothetical) our fellow public servants find in their deliberations that they prefer a high level of public goods, our revenue committee's decision to require an absolute nominal equality revenue norm makes their preferences unattainable. So, at a minimum, revenue rules should not foreclose reasonable societal policy choices.[116]

The strong conception's demands on revenue broaden even wider once we consider other ways in which the rules for raising revenue could potentially render some deliberations pointless. Recall the example of the 100% tax on farm subsidies. Such a high tax is very likely irreconcilable on grounds of either policy or principle with the goals of those who enacted the farm subsidy. It would be reasonable for the subsidy's enactors to ask why they bothered at all. Thus, revenue can undermine deliberation not only by failing to raise enough money for some projects, but also by unwinding or altering the principled choices that the deliberations produced.

Because of the possibility that taxes can frustrate some of the possible outcomes of deliberation, the authors of a revenue system must commit to leave in place reasonable existing distributions. If the participants in republican debates know before they begin their deliberations that the results may be freely altered later by the tax system, the debates become, again, musings about mythical beasts—interesting, but potentially pointless.[117] In particular, if those

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114. For one notable proponent of such a tax, see Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL. 221, 269–71 (1995).

115. *See* Reuven Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1631–38 (2000) (describing the relationship between government provision of society-wide services, such as social insurance, and the need for distortionary taxes, i.e., taxes other than head taxes).

116. This is not to say that the tax system must demand from citizens a large portion of their available funds on the off chance the government will want to spend it all. We could write rules that would permit large funds to be raised, while setting actual tax rates relatively low. For instance, the current income tax has had top rates ranging from the current peak of above one-third to more than ninety percent, all while the basic structure has remained largely unchanged.

117. *Supra* notes 102–06 and accompanying text.

who carry out the revenue function reserve for themselves the right to make their own distributive judgments, other policymakers have little assurance that their preferences will be realized. Few participants (other than the revenue officials) will wish to engage whole-heartedly in such a system. Thus, in order to assure that debates will be vigorous and meaningful, the tax system's authors must pledge in advance not to disturb any reasonable outcome that could arise out of those debates.[118] This, then, is the link between deliberation and HE: HE represents the fulfillment of a promise, made by the tax system to society at large, that the process of raising revenue will not frustrate the choices society makes after its deliberations.

It might be objected that all policies are potentially in conflict, and thus that no deliberators can ever be assured that someone else will not come along to render their efforts fruitless. However, the revenue function is unique in its potential for conflict in two different ways. First, the possibility of conflict between two non-revenue policies does not necessarily remove the incentive for deliberation; it might simply incentivize the disputants to widen their debates to include their antagonists.[119] This cannot easily be done with revenue, for reasons I will explain shortly.

Second, the risk of conflict with other policymakers is a burden that deliberators typically must accept as the cost of a shared society, but that same tolerance is not owed to crafters of revenue laws. In a deliberative society, we all must tolerate reasonable claims by others, and the cost of our own autonomy is our willingness to grant that same level of autonomy to others.[120] As a result, deliberators must put up with possibly inconsistent deliberations elsewhere in government, because those other lawmakers have a right to further their own goals through law. Again, though, the revenue function is unique. Unlike virtually any other form of lawmaking, it has no ends of its own. It exists only as a method for funding the choices made elsewhere. Thus, by definition, its

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118. I have added the qualification "reasonable" here and elsewhere because, even on strong accounts of what participants in a deliberative society owe one another, there is no obligation to accept "unreasonable" outcomes—results that would be patently unfair to one side or another. *See* JOHN RAWLS, POLITICAL LIBERALISM 54 (expanded ed. 2005) (describing a "reasonable society" as one in which people have "their own rational ends they hope to advance, and all stand ready to propose fair terms that others may reasonably be expected to accept").

119. *See* HANNAH PITKIN, FORTUNE IS A WOMAN: GENDER AND POLITICS IN THE THOUGHT OF NICOLO MACHIAVELLI 90, 300–04 (1984) (highlighting the need for a "struggl[e] toward agreement" in a healthy political state); Sunstein, *supra* note 102, at 1575–76 ("Discussion and deliberation depend for their legitimacy and efficacy on the existence of conflicting views.").

120. *See* DWORKIN, *supra* note 69, at 207 (discussing the obligations arising from political association); RAWLS, *supra* note 118, at 48–54 (viewing reciprocity and cooperation as necessary in a reasonable society).

authors can demand no leeway from those engaged in making those other choices.[121]

To sum up this piece of the argument, HE in the form of deference to existing distributions is the logical outgrowth of the goals of raising revenue in the first place. We gather funds in order to effectuate the outcomes of deliberative democracy. It would be illogical, then, to write rules for raising revenue that might frustrate the deliberative process. Thus, the revenue system should be designed in a way that minimizes disincentives to deliberate. My claim here is that HE helps to accomplish this goal by offering assurances that, absent some rationale external to revenue raising alone, tax will leave in place society's pretax distribution.

b. Ex Ante Commitment vs. Ex Post Consistency

It could be argued that my argument so far is a case not for absolute neutrality in revenue raising, but, along the lines that Murphy and Nagel assert, only a brief in favor of consistency between revenue and other policy choices.[122] That is, rather than promising in advance to leave in place whatever distribution society reaches, the tax system might simply be rewritten each year to accord with our new choices. If we decide we want health care, and the old Tax Code is a head tax, discard the head tax and install an income tax. Or, to frame this point in terms of the "committee" idea, we might say that the task of raising revenue should simply be subsumed into the policy-writing committees. If participants in society's deliberations know that they will have the power to write revenue rules themselves, then they need not fear that the revenue rules will make their own efforts nugatory.

There are, however, at least four reasons why the ex post consistency approach is a less satisfying solution to the threat revenue rules pose to deliberation. First, the ex ante commitment to neutrality—HE—is more open to change, especially change within fiscal years. Under an HE regime, the revenue system is the same, regardless of policy. In contrast, the ex post consistency approach demands a new set of revenue rules whenever non-

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121. It is worth emphasizing that I am not claiming that the tax system as a whole cannot be used as a vehicle for expressing value preferences, such as distributive justice. My argument here is limited to tax as a source of revenue. Indeed, if the revenue function is to be neutral between reasonable ends, it must be willing to accept a reasonable argument that the tax system is the best vehicle for achieving other policy goals.

122. *Cf.* MURPHY & NAGEL, *supra* note 5, at 88–90 (arguing that it is theoretically possible to determine the appropriate level of necessary revenue after determining just distribution of taxes and spending).

revenue policies change in a way that renders them inconsistent with the existing set of revenue rules. This means that inevitably there will be transition costs. If our policy rules change after we have already raised revenue for the current budget year, we must either accept some conflict between policy and revenue until the next cycle, or re-compute this year's tax, issuing refunds and new bills.[123]

In addition to their welfare consequences—a point I explore more in the next Part—these transition costs diminish the attractiveness of a new rule. In order to change policy under an ex post consistency regime, we either must be willing to accept some conflicts between that policy and the revenue rules, or to enact that policy using a lesser set of societal resources (since some will have been used up in administering, or mitigating the period of, the transition). Although these effects are unlikely to be large enough to make deliberation over new policy pointless, they do make deliberations less worthwhile than they would be under HE.

Second, demanding consistency between policy and revenue rules likely forecloses the possibility of intragovernmental disagreements, the threat of which is important for good government. It is a very familiar point that separation of powers has strong normative appeal.[124] For example, dividing authority between branches, or between federal and state governments, creates checks against government abuses that enhance individual liberty.[125] And having multiple actors with different incentive structures and constituencies improves deliberation.[126]

This vision of divided government is hard to reconcile with an ex post consistency approach to revenue for the simple reason that it is difficult to be consistent simultaneously with two competing policies. For example, we presently have a federal tax law that grants larger tax benefits to schools

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123. Or, anticipating this problem, we could adopt very short budget cycles (monthly, say, rather than annual) at the cost of multiplying many times over the costs of administering the system.

124. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155–56 (1992) ("The genius of the American Constitution lies in its use of structural devices to preserve individual liberty."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577–78 (1984) (explaining that dividing government into distinct branches prevents tyrannical rule).

125. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (discussing the division of power between the three branches of government).

126. *See* Seidenfeld, *supra* note 106, at 1541–62 (viewing administrative agencies as strategically positioned to account for the diversity of public opinion in its decision-making process).

performing consistent with "public policy" than to others.[127] Congress's education policy committees might write legislation that reduces government control over secondary-school education, while another committee (say, the civil rights subcommittee of the judiciary committee) might enact rules that enhance that influence of government, even as the Federal Department of Education chooses a third path, and state and local governments choose yet others. It is doubtful that any one version of "public policy" could satisfy all of these views.[128]

The upshot of this likely conflict is that ex post consistency again gives us unwelcome tradeoffs that HE does not. Under consistency, we can have a single policy for all of government, to which revenue policy can then be made to hew. Or we can have the possibility of divided government, but at the cost of inconsistency with revenue policy for some. In either case we have less effective government, and so once more have a diminished incentive to deliberate on the part of those whose views will be rejected by the revenue system.

Third, inviting value judgments into the crafting of revenue rules increases the opportunities for self-serving behavior on the part of those who write, administer, and enforce the revenue law; knowledge of that fact may again dissuade some from engaging in full deliberation. Even if those who write policy also write revenue laws, there inevitably will have to be delegation of the authority to others to enforce and administer the revenue rules. Revenue administrators can easily frustrate the goals of the revenue-law writers. For instance, administrators could quash efforts to shift the tax burden to the wealthy by declining to audit large estates,[129] taking a lax attitude towards

127. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 588–96 (1983) (finding that educational organizations that discriminate on the basis of race violate "public policy" and are therefore not eligible for tax exemption under 26 U.S.C. § 501(c)(3)). It is arguable that the costs of obtaining an education should be excluded from the definition of "income," albeit perhaps amortized over the life of the taxpayer. *See* DODGE, *supra* note 1, at 135 (claiming that "increments in human capital" should be excluded from the tax base). Granting tax benefits directly to schools themselves can be thought of as a way of achieving something like this result without having to go through the bother of calculating how long each taxpayer is likely to live and dividing her education costs accordingly.

128. The Court seems largely to have avoided this problem by concluding that "public policy" consists only of what all of the branches of government, at least at the federal level, have agreed upon. *Bob Jones*, 461 U.S. at 598.

129. *Cf.* David Cay Johnston, *IRS Will Cut Tax Lawyers Who Audit the Richest*, N.Y. TIMES, July 23, 2006, at A16 (noting that the IRS audits a tiny fraction of all estates, and has laid off most of its estate tax auditors).

efforts by high-income individuals to shield their wealth,[130] or, as in the education example, refusing to enforce "public policy" restraints.[131]

While the problem of delegation is hardly unique to tax, it would be exacerbated by a choice to reject HE in favor of ex post consistency. Congress has a standard set of tools, such as budget hearings and "fire alarm" suits by aggrieved private individuals, which it uses to monitor agencies.[132] These tools are more problematic when our revenue agency is free to invoke value judgments in justifying its choices, rather than simply adhering to the status quo. Value judgments are often difficult to quantify, apply, and weigh against competing interests. Thus, instances where the agency has frustrated the various preferences of those who enacted a piece of legislation may become harder to detect and harder to deter. For example, in the case of choices about whom to audit, the IRS can always claim that it is not rejecting Congress's deliberative preference, but instead balancing that need against other, putatively more effective methods for ensuring that the wealthy pay the appropriate share of tax. It will not be easy, absent mind-readers or incriminating emails, to prove this claim is untrue. Yet again, knowing of the likelihood that many of their choices could ultimately be frustrated, citizens and legislators will have diminished incentives to engage in deliberation.

Fourth and finally, consistency might make principle decisions psychologically more difficult. Recall the analogy between revenue and the First Amendment. In the United States we have emphasized the role of apolitical institutions, particularly the federal judiciary, in carrying out the difficult task of protecting our second-order preferences—our preferences for institutions that allow us to engage in free and open political choices.[133] Yet, why do we assume that judges will not simply institute their own political preferences, rather than preserving free speech? I have developed elsewhere arguments that institutional design is probably the best resolution of these sorts

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130. *See Deconstructing the Tax Code: Uncollected Taxes and Issues of Transparency: Hearing Before the Subcomm. on Fed. Fin. Mgmt., Gov't Info., and Int'l Sec'y of the S. Comm. on Homeland Sec. and Gov't Affairs*, 109th Cong. 24 (2006) (statement of Russell George, Treasury Inspector Gen.) (describing lackluster IRS efforts to gather information about high-income individuals).

131. *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 420 (3d ed. 2006) (noting that the Reagan Administration attempted to abandon its defense of the IRS's position in the *Bob Jones* case).

132. *See* Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement*, 40 U.C. DAVIS L. REV. 1381, 1420–23 (2007) (summarizing congressional oversight tools).

133. *See* Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1046, 1055–56, 1064–66 (2004) (describing the judiciary's role of enforcing "second-order constraints").

of dilemmas.[134] For example, one story about why judicial review is effective is because there is a strong role-norm associated with judging that encourages judges to be public-regarding.[135] Separating the revenue function from everyday politics, in much the way constitutional deliberation is set aside for judges, could help to reinforce a public-regarding role for those officials who participate in the revenue process.[136]

c. A Footnote: Epistemic Superiority

In addition to this rather elaborate justification for HE, there is a second, simpler, non-welfarist explanation, although its reach is fairly limited. Recall that one potential content-independent rationale for deference to the redistributive judgments of others was the possibility that those others' judgments were epistemically superior—that is, the other to whom the tax-statute writer deferred was more expert in making distributive judgments, so that it was more likely those judgments were right.[137] It was not obvious, though, why that should be the case. I offer one possible grounding here.

In a world where different government officials specialize in different tasks, there is a stronger argument that those who sit on the revenue-raising committee are epistemically inferior to their other colleagues. That is, if our only job is to raise money, without giving much regard to concerns about distributive justice, it is reasonable to think we are less skilled at making judgments about distributive justice than others who do so more often. Thus, on those occasions where the work of raising revenue implicates distributive questions, those who write revenue statutes should defer to the judgments of others, since generally that is more likely to lead to the outcome that is considered best.

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134. *See* Brian Galle, *The Justice of Administration: Judicial Responses to Executive Claims of Independent Authority to Interpret the Constitution*, 33 FLA. ST. UNIV. L. REV. 157, 230 (2005) ("By invoking exclusivity selectively, the judiciary can protect its own institutional interests while at the same time garnering many of the benefits cooperation [with the executive] offers.").

135. *See id.* at 181, 202–09 (noting the role of judicial precedent in shaping a court's analytic approach).

136. *Cf. id.* at 177–78, 181 (arguing that public expectations for virtuous behavior by public officials may reinforce officials' own public-regarding norms). While this is a highly pragmatic inquiry, it is not welfarist in the strict sense. Our ultimate question here is what would best further a form of republican deliberation that enhances individual dignity and autonomy, rather than simply what would maximize total social welfare.

137. *Supra* notes 69–71 and accompanying text.

This is not a wholly fanciful example. Consider the IRS. In many senses the work of enforcing the laws is no different than writing them. Enforcement decisions require judgments, especially in difficult cases. For instance, scrutinizing tax shelters demands of the IRS a sophisticated understanding of the goals of the tax system. When a transaction satisfies the literal words of a statute granting favorable tax treatment, but seems in tension with the text's intent, an enforcer must have a theory of how best to discern that purpose in order to decide whether the transaction deserved favorable treatment. Many commentators have argued that in these cases both the IRS and the courts should limit their own search for statutory meaning to the literal import of the words in the Tax Code, on the grounds that courts and the Service are not well positioned to understand Congress's tax policy.[138] In essence, this is an argument that Congress is epistemically superior to the IRS and the courts, and the latter two should avoid altering what Congress has done.[139]

On this account, HE is highly contingent on institutional arrangements.[140] In a government where all actors are equally practiced and expert at making judgments about distributive justice, there is little ground for any one actor to defer, on epistemic grounds, to another. Our own government perhaps is one in which some of those who contribute to the meaning of tax law—the IRS and judges—may be epistemically inferior to others.[141] But this is a contended point, and one that, in any event, gives little guidance to the practice of writing tax statutes.

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138. *See* Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1949, 1953 (2005) (identifying "the ambiguous and untrustworthy application of the economic substance doctrine" as the greatest problem in the tax shelter field); Amandeep S. Grewal, *Economic Substance and the Supreme Court*, 116 TAX NOTES 969, 970–72 (2007) (criticizing the lower courts' use of the economic substance doctrine, believing it causes them to neglect the explicit meaning of the statutory language); David P. Hariton, *Sorting out the Tangle of Economic Substance*, 52 TAX LAW. 235, 245 (1999) (arguing that purposive interpretation is often only "sheer speculation").

139. Of course, it is debatable whether a textualist or purposive interpretation of a statute is more likely to leave in place what Congress has done. My only point here is that either argument can deploy the claim that later decisionmakers should be agents of Congress, rather than independent decisionmakers.

140. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889–90 (2003) (arguing that the question of whether judges should follow a narrow semantic meaning of text depends on empirical data about relative capabilities of different institutions).

141. *See* Chirelstein & Zelenak, *supra* note 138, at 1949 (suggesting that uncertainty in the meaning of tax statutes results when courts interpret tax policy).

d. Is It "Horizontal"?

One significant counterargument to both the deliberation and epistemic superiority points is that they result in something that is not, strictly speaking, "horizontal" equity. As Kaplow claimed, and as Dan Shaviro urged at a presentation of this paper, any method of comparing taxpayers that allows us to declare that they are similarly situated horizontally also allows us to rank those taxpayers vertically.[142] For instance, suppose we conclude that we should compare taxpayers based on their annual income. Using income as a metric allows us to say that our friends Castor and Pollux are identical, as both have $100,000 in income. It also allows us, of course, to rank the brothers above those earning less than $100,000 and below those earning above $100,000. When we impose tax, we may wish to tax those with higher incomes more heavily. So the fact that Castor and Pollux are equal may be a fact that emerges from our efforts to determine, for purposes of vertical equity, how much each taxpayer should contribute. Crucially, this implies that the fact that the two are equal supplies no *additional* reason to treat them identically, other than the reasons we already used to rank them vertically. That is, each pays $30,000 in tax because he has an income of $100,000, not because his identical brother paid $30,000. What work, then, is HE doing?

The key oversight of this critique is that it neglects the possibility that HE will supply a different basis for comparing taxpayers than whatever our choice of vertical equity principles demands. For instance, we might decide that a just society requires that those with greater welfare should be obliged to transfer some portion of their material resources to those who are worse off, and that the tax system is the most appropriate vehicle for that transfer. As I will argue in Part V, however, it is likely that the logic of HE demands that we compare taxpayers based not on their welfare, but rather on their ability to pay, which is measured in more tangible ways, such as income. So this particular theory of vertical equity might tell us to tax Castor (the healthy twin) more than his brother, but HE tells us that they should pay the same. Again, HE will likely yield to a decision to use the tax system for redistribution based on a particular, controversial theory of justice. But my point here is that, in the absence of any such theory, HE provides us with a default rule for how to compare and tax individuals.

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142. Kaplow, *A Note*, *supra* note 4, at 192; Posting of Daniel Shaviro to Start Making Sense, http://danshaviro.blogspot.com/2008/02/tax-policy-colloquium-session-on_22.html (Feb. 22, 2008, 10:22 EST) (on file with the Washington and Lee Law Review); *see also* Peter J. Lambert & Shlomo Yitzhaki, *Equity, Equality, and Welfare*, 39 EUR. ECON. REV. 674, 674–75 (1995) (claiming that HE is indistinguishable from vertical equity, properly understood).

So the particular contribution of HE is that it provides an *internal-to-tax* rationale for ordering the tax system.[143] We need not reach any comprehensive theory of political justice, applicable not only to tax alone but also to society as a whole, in order to compare one taxpayer to another. It is true that this internal-to-tax rationale may be partly or wholly eclipsed once we reach such a theory. But the default rule can still operate when redistributive theories are undeveloped or uncertain in their outcome.

It might further be argued that, even if the concept of HE I described is not simply redundant with vertical equity, it still is not particularly horizontal. To put this objection more nearly in my terms, recall that both of our present theories of HE suggest that revenue rules should leave in place existing distributions. This implies that we should respect not only the choice to make two particular individuals equal, but also the choice to leave two or more individuals unequal—to leave Kevin Garnett with his millions and your humble author with his, well, with a sum much smaller than that. Again, then, it is arguable that the principle driving what I have described as HE may also be a component of determining how to distribute the burden of tax across the population, a task that is usually described as being a component of vertical equity.[144]

Although the rationales I offer for HE here also offer some information about how we should distribute the burden of taxation, they are much more powerful in the context of very similarly situated taxpayers. To demonstrate this point, let me first be precise about the obligations imposed by HE. HE, as I have articulated it, does not require us to leave each individual with the same amount of income or whatnot that they had before tax. That would, obviously, mean that there was zero tax. Nor need we tax everyone the same amount. Our burden is to respect, as best we can discern, the possible distributive justice judgments reflected in the pretax positions of taxpayers. In all likelihood, the best we will be able to say is that there is a preferred ranking of individuals.[145] Garnett has, and thus we presume was intended to have, more than me. But it will be extremely difficult to say for certain *how much* more Garnett ought to

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143. For more on the distinction between internal-to-tax rationales and others, see DODGE, *supra* note 1, at 20–21.

144. *See id.* at 88 (describing the role of fairness in theories of horizontal and vertical equity).

145. *See* Anthony B. Atkinson, *Horizontal Equity and the Distribution of the Tax Burden*, *in* THE ECONOMICS OF TAXATION 5–7 (Henry Aaron & M. Boskin eds., 1980) (asserting that HE is concerned primarily with forestalling "rank reversals"); Robert Plotnick, *A Measure of Horizontal Inequity*, 63 REV. ECON. & STATS. 283, 283 (1981) (stating that HE "requires that rankings of all units should not be altered during the redistributive process").

have without adopting a particular theory of distributive justice.[146] The revenue project, however, requires us to be open to any reasonable theory that fits with the evidence society presents. In other words, HE might tell us something about the ordinal rankings of taxpayers, but it tells us very little about their individual tax *rates,* the determination of which likely rests on controversial notions of the good. So the fact that taxpayer A pays a tax $T tells us very little about how much taxpayer B should owe under HE principles.

Indeed, I want to claim that the existence of an ordinal ranking of two differently situated taxpayers tells us nothing under HE about their comparative tax burdens. Take the Kaplow example I mentioned earlier, in which, let us say, Castor is ranked higher than Pollux. Don't we know now, at least, that given a tax $(T% * income) for Pollux that Castor's bill must be $((T+x)% * income)? No. We do not know, because we do not know whether our theory of justice requires a progressive tax. On plausible assumptions, the ideal revenue-raising tax would in fact be regressive.[147]

In contrast, when two taxpayers are so similarly situated that no reasonable citizen would draw a distinction between them, we can use the amount of tax imposed on one to compute the tax imposed on the other. If Castor and Pollux are very closely ranked, given a tax $T on Castor, we know that the appropriate tax on Pollux is also $T. We know this because of the way that ordinal rankings work. Castor's tax can be neither higher nor lower than Pollux's, because if it were he would be moved either higher or lower on the ranking scale; *either* move would violate the rule against ranking changes. In contrast, as I have just shown, when we have two differently ranked taxpayers, we do not know whether a change in rate or (in the absence of a graduated tax) a change in total tax in fact has altered the correct rankings. So HE's effect for similar

146. In the hopes of avoiding an extended detour on this point, I offer the following example. Suppose that we are welfarists. We agree that there is a diminishing marginal utility of money: The average millionth dollar is worth less, in welfare terms, than the first, because the first buys essentials, the absence of which would cause great suffering, while the millionth buys unneeded frivolities, the absence of which would cause, at worst, pouting. GRUBER, *supra* note 68, at 53. To maximize welfare, then, we should impose a higher tax on those with more money. But, in order to determine how much more the richer should pay, we would need to know not only by how much the marginal utility of each dollar declines, but also our social welfare function—our social agreement on what represents the good life, including our preferences for how to distribute wealth. *See id.* at 53–54 ("The social welfare function can take one of a number of forms, and which forms a society chooses is central to how it resolves the equity-efficiency trade-off.").

147. *See* Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1919–66 (1987) (summarizing theory of optimal income taxation, which posits that declining marginal tax rates may be more efficient, especially if paired with a flat grant to all taxpayers).

taxpayers is a special case of rank preservation, in which we have uniquely good information about how to compare the two taxpayers.

Thus, there are two ways to answer the charge that the version of HE I have put forward here is merely duplicative of vertical rankings. First, HE provides a distinctive notion of pure tax fairness—a default rule for the tax system prior to any additional, outside value judgments. And, secondly, that set of default rules, although loosely useful in comparing disparate taxpayers, is really only powerful when two taxpayers are very similar. Thus, while my version of HE may not be strictly "horizontal," that term seems as fair a description as any for the form of tax fairness I describe.

e. Tax Goals Other Than Revenue

In sum, to the extent that we think of tax as having a distinctive revenue function, there are good reasons to think that HE has independent value. HE can represent a form of neutrality among ends, a determination that tax will take as given the explicit or implicit value judgments represented by the ordering of the world we find before imposition of the tax. I have laid out here why this view might be sensible from the general perspective of autonomy or good government, and in the next Part I offer some welfarist arguments as well.

One important qualification, though, is that this all depends on our agreement that tax serves solely a revenue function. That is not likely true, any more than it is true that tax can only be regulatory or redistributive.[148] It is perfectly plausible, then, that HE, as I have framed it here, remains uncompelling in the context of a tax's redistributive or regulatory functions.

In fact, though, as the idea of the "tax expenditure" suggests, HE does have something to offer theorists or enactors of redistributive and regulatory taxation.[149] HE can serve as a signal or waypost to point out when we have crossed over from revenue taxation to something else. Obviously, in the real world we live in, there is no neat separation of tax-writing authority among committees charged with different kinds of tax functions. When we confront a proposed tax enactment that appears to violate horizontal equity, then, HE helps to frame the rhetorical task facing the enactment's proponents. The proponents

148. *Supra* notes 99–101 and accompanying text.

149. *See* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 2 (1985) (arguing that a country must recognize the presence of tax expenditures because "only through attention to those expenditures can it control its budget policy and tax policy"). *But see* Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Tax Reform*, 80 HARV. L. REV. 925, 985 (1967) ("There are many areas in which the search for 'preferences' is doomed to fail because we cannot confidently say which provisions are 'rules' and which are 'exceptions.'").

now must tell us why, from a revenue perspective, we should disregard HE. Or, alternatively, they must offer some regulatory or redistributive explanation, and then convince us of the merits of that policy. In any case, it is the violation of HE that triggers the obligation to offer justifications.[150]

The deontic theory of HE also implies limits on the power of HE. If we accept the deliberation rationale for HE, we likely must be willing to make room in the Tax Code for purposes other than raising revenue. Again, the goal of the revenue function of taxation is to facilitate the crafting of considered policy by the rest of society. Thus, if the considered judgment of policymakers is that the tax system is the best way to implement non-revenue policy goals, such as redistribution, the revenue function of taxation would have no grounds for gainsaying it. So, in effect, under the revenue approach, HE is a default setting for the Tax Code, which can be displaced by other policy concerns. Thus, while it does respect the status quo, HE should offer no ammunition to those, such as those targeted by Murphy and Nagel, who disfavor redistributive taxation.

IV. Does HE Increase Welfare?

As we have seen, another major criticism of HE, especially in the economics literature, is that it is said to be inconsistent with the principle of welfare maximization.[151] Since welfare is incommensurable with equality, or the underlying principles represented by equality, it is unclear how these two values should or can be traded off against one another.[152] It may be possible,

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150. For similar reasons, it is not a problem for my theory that many statutes cannot necessarily be neatly sorted between revenue-raising, redistributive, or policymaking. If a tax provision respects HE, that is a reason to accept it as consistent with the revenue function of taxation. If it does not, then that is a reason to demand some explanation of the statute on policy or redistributive grounds. The point is that we do not need any *a priori* system for figuring out what counts as a revenue provision; something is a revenue provision exactly because it can be justified under tax revenue norms and we are willing to see it enacted on those grounds.

151. *See, e.g.*, Kaplow, *A Fundamental Objection*, *supra* note 40, at 499–502 (illustrating why equity norms conflict with efficiency concerns).

152. *See id.* at 499 ("The question is whether one can *consistently* adhere to both an anti-utilitarian tax equity norm and the Pareto principle."); Kaplow, *A Note*, *supra* note 4, at 193 (discussing inherent difficulties in reconciling measures of welfare cost with measures of HE); McDaniel & Repetti, *supra* note 2, at 619 (positing relative trade-off of indexes which "derive their normative base from economic judgments, values based on some theory of justice and efficiency concerns . . . is between or among those potentially conflicting fundamental judgments and values"); Rosen, *supra* note 18, at 318 (noting the variety of weights—which may depend upon ethical determinations—that can be applied to HE as that metric affects measurements of social welfare). For one effort at resolving these tensions, see Zolt, *supra* note

however, to set out a purely welfarist account of HE.[153] If the welfare value of HE can be specified, then it should become rather more straightforward to determine how to trade off HE against other welfare-enhancing principles. In this Part, I attempt to make the welfarist case for HE and sketch some suggestions for how the welfare gains of HE might be measured.

Let us begin by recalling that one of the most significant implications of HE is that it preserves the existing distribution of whatever theory suggests we ought to measure.[154] If we assume that this preexisting distribution is the result of deliberate policy choices by policymakers, under a perfectly horizontally equitable tax, the choices of these other policymakers will be left perfectly intact after the tax is imposed. One alternative, again, would be to substitute our own judgment about the desirable distribution of goods, and to use the tax system to bring the existing distribution more closely in line with our ideal. Or, in the other direction, we could choose to be completely indifferent to the distributive effects of the tax.

Welfarists are open to either of these two latter approaches. In general, welfarists believe that society should maximize well-being within the confines of its chosen social welfare function.[155] The social welfare function may or may not include distributive preferences.[156] Thus, the welfarist would be open to pure utilitarianism, in which we strictly maximize total utility, if that is the

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2, at 99–101 (discussing possible costs and benefits of according equity greater importance than other considerations in structuring a tax scheme).

153. *See* Musgrave, *Once More*, *supra* note 2, at 117–19 (offering a tentative effort at justifying horizontal equity on welfare grounds). However, as Kaplow points out, Musgrave's attempt simply assumed that there would be some welfare benefit from equity without explaining where that benefit might arise from. *See* Kaplow, *A Note*, *supra* note 4, at 193 ("The only other support Musgrave offers for HE . . . is that some famous proponents of some theories stated that HE was important. He does not, however, indicate the basis for such statements or defend them.").

154. For ease of reference, I will refer to our equilisand here as "goods," but at the moment I want to leave open whether we must equalize wealth, income, primary goods, utility, or something else.

155. Adler & Sanchirico, *supra* note 2, at 291–304; Zolt, *supra* note 2, at 97–98.

156. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 27–28 (2002) (recognizing multiple views on distribution of well-being and rejecting the notion that policy analysis should focus solely on fairness, without concern for the well-being of individuals); Adler & Sanchirico, *supra* note 2, at 296–97, 300 (noting that the utilitarian social welfare view does not contemplate the relative utility levels of individuals in society; rather, when an individual's utility changes, "[s]ocial welfare changes by the same amount regardless of how well off . . . that individual is"); Kaplow, *A Fundamental Objection*, *supra* note 40, at 505 ("[I]ndividuals might have direct preferences for the distributional characteristics reflected in anti-utilitarian norms.").

chosen social welfare function.[157] But the welfarist could also accept a Rawlsian leximin approach, in which we attempt to maximize the well-being of the least well-off members of society.[158] The key is that, within the confines of the preferred social distribution, the welfarist strives for efficiency and eschews unnecessary welfare losses.[159] She therefore attaches a high importance to pareto-optimality, and attempts to minimize deadweight losses.[160] Indeed, that is a basic tenet of welfarist tax policy: Tax should minimize the total "excess burden" that taxation places on society.[161]

Under these standards the welfarist should in some cases prefer our first alternative: Preserving the status quo. Accepting the status quo distribution can reduce decision costs, transaction costs, and transition costs, which in turn reduces the net burden of taxation.

The argument that HE reduces decision costs derives from the Rawlsian notion of "public reasons," later elaborated on by Sunstein as part of his theory of "incompletely theorized agreements."[162] Under both Sunstein and Rawls, it is not only possible but desirable for members of society to agree on distinct policy outcomes where each member's reasons for supporting the policy may differ.[163] The contrasting sides agree to go forward on grounds that both can find "reasonable," even if not ideal compromises.[164] In Rawls's conception,

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157. *See* Adler & Sanchirico, *supra* note 2, at 296–97 (discussing welfarism as a broader social welfare function than utilitarianism, in that welfarism may allow for incorporation of "equity" in distribution schemes or may adopt purely utilitarian, non-equity regarding distribution schemes).

158. *See* Zolt, *supra* note 2, at 98 ("The leximin, based loosely on Rawls, judges welfare of society based on the least well off members."). For Rawls's explanation of his theory, see JOHN RAWLS, A THEORY OF JUSTICE 61–64 (rev. ed. 1999).

159. *See* Kaplow, *A Fundamental Objection*, *supra* note 40, at 498 (arguing for the preeminence of the Pareto principle, which "holds that a reform preferred by all individuals should be implemented").

160. *See* Adler & Sanchirico, *supra* note 2, at 293–94 (discussing the Pareto principle and its important role in welfarism); Kaplow, *A Fundamental Objection*, *supra* note 40, at 498 (discussing the impact the Pareto principle can have on tax policy); Zolt, *supra* note 2, at 63 ("Efficient taxes distort as little possible; inefficient taxes distort more.").

161. *See* Zolt, *supra* note 2, at 64 (suggesting that when efficiency is the primary focus, developing a tax structure which "minimizes excess burden" is one method that is sensitive to equity considerations).

162. RAWLS, *supra* note 118, at 213; CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 46–48 (1996) (connecting Rawls's notion of "public reason" with Sunstein's "incompletely theorized agreements"); SUNSTEIN, *supra* note 108, at 11, 50 (noting advantages of a minimalist approach to distributive justice in that it "allow[s] people who disagree on the deepest issues to converge" and "is the best way to minimize the sum of . . . decision costs").

163. RAWLS, *supra* note 118, at 216–18; SUNSTEIN, *supra* note 108, at 50–51.

164. RAWLS, *supra* note 118, at 446; SUNSTEIN, *supra* note 108, at 250.

this willingness to accept agreement is a necessary precondition to a pluralist society.[165]

In Sunstein's more welfarist account, incomplete agreements allow us to enact policy that enhances the short-term subjective welfare of interested parties, with the acknowledgement that there may be a need for pie-splitting on the grounds of disagreement later on down the road.[166] In the absence of such agreements, decisionmaking bodies can be paralyzed by irreconcilable differences between deeply-held and fundamental world views.[167] If society is going to tolerate the existence of more than one such view, it must accept compromises.[168] By definition, world views cannot be compromised on their ultimate foundations without extensive social struggle.[169] But they may sometimes, as we saw with utility and ability-to-pay, agree on particular policy outcomes. An incomplete agreement, therefore, is a decision by all sides to accept a result that is justified by different reasons for each of the enactors.[170] At times, this may have the result that future applications or extensions of that policy are indeterminate.[171] But in the meantime, society has achieved a practical result that is satisfying to many of the disagreeing parties, without having to bargain or fight to agreement as to ultimate foundations.[172] Thus, to the extent that it rests on this notion of incomplete agreement, horizontal equity might be a "reasonable" common ground for a plural society with many views of how to measure the "good."

To see how this might play out in the tax context, consider the question whether tort judgments for pain and suffering ought to be deducted from taxable income.[173] In the pain and suffering example, it is possible that using "horizontal equity" analysis allows us to begin our debate at our point of disagreement, rather than at square one. It may be true, as Kaplow argues, that

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165. RAWLS, *supra* note 118, at 216–18.

166. SUNSTEIN, *supra* note 108, at 13, 47–48.

167. *See id.* at 50 (stressing the importance of incompletely theorized agreements in a pluralist society).

168. *Id.* at 14, 50–51.

169. Rawls, *supra* note 107, at 136.

170. *See* SUNSTEIN, *supra* note 162, at 35 (noting that individuals often reach legal conclusions without identifying all of the discrete logical steps that produce that conclusion); SUNSTEIN, *supra* note 108, at 14 ("Incompletely theorized agreements on particular outcomes are an important means by which diverse citizens are able to constitute themselves as a society.").

171. SUNSTEIN, *supra* note 108, at 12, 259.

172. *Id.* at 14, 42–43.

173. I summarized the divergent approaches that different models of tax policy might take to this question in Part I. *Supra* notes 28–30 and accompanying text.

HE does not tell us whether to measure equality of utility or equality of ability-to-pay (although I argue that in fact it does).[174] But our agreement to the relevance of HE bypasses the need to engage in another, more fundamental debate. In Murphy and Nagel's view, before we could consider *either* the utility or ability-to-pay of our twin brothers Castor and Pollux, we would have to decide whether they arrived at their pretax state of either utility or wealth justly.[175] HE, by assuming the justness of existing distributions, avoids the need to ask whether Castor came fairly by his salary or Pollux by his tort judgment. Instead we agree—perhaps each for our own unique reasons—that we are willing to accept the present state as a fair starting point, at least for purposes of purely revenue provisions. HE thus leaves us with plenty of argument, but much less than we might have otherwise faced.[176]

A ready counter-argument here is that leaving revenue tax incompletely theorized does not eliminate the need to make decisions about distributions, but instead only relocates those decisions.[177] There might be no overall social gain if we simply reschedule our debate over redistribution from Monday in the revenue committee to Tuesday in the redistribution committee. The forcefulness of this point is somewhat diminished, however, by the time value of reaching agreement. As Sunstein points out, one of the virtues of incompletely theorized agreements is that they allow policy to go into effect sooner than it might under different circumstances, increasing society's total welfare.[178] The key question is therefore whether reserving redistributive questions in fact conserves societal effort, or instead increases it. If the latter, there is a second question as to whether the cost of this increase in effort is larger than the time value of earlier agreement.

In order to begin to get a handle on the question of whether delaying decision saves effort, suppose that nearly all of the Tax Code's thousands of detailed rules are necessary to an efficient revenue function (setting aside the efficiency effects of HE). Suppose further that only a tiny fraction of the Code—the rate structure and rules to prevent abuse of that structure, say—is

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174. Kaplow, *A Note*, *supra* note 4, at 191–92.

175. Alternatively, we would have to decide how best to distribute utility or wealth. But how an individual obtained their wealth or happiness is, according to Murphy and Nagel, usually relevant to how much of either they should retain or be given. For instance, Murphy and Nagel agree that individuals should be able to retain the wealth they earn freely in a justly-structured market. *Supra* notes 50–59 and accompanying text.

176. *Cf.* Miller, *supra* note 2, at 531 (observing that given "our pluralist society, it is difficult to settle on a taxing scheme that is broadly acceptable").

177. *Supra* notes 155–66 and accompanying text.

178. For example, at an average annual rate of return on investment of 5%, a compromise that allows a $1 billion value program to be enacted one year earlier is worth $50 million.

needed to correct all of the distributive flaws left in place by the revenue function.

Under reasonable assumptions, this split would result in large decision-cost savings from HE. We need to assume that to enact, administer, or litigate any tax provision, whether it be revenue or redistributive, would often have distributive consequences. And we must assume that it is unnecessary, in enacting purely redistributive provisions, to revisit the individual consequences of each revenue rule. If those two assumptions are true, then it can also be true that splitting revenue from redistribution could save decisionmaking effort: There will be many revenue decisions implicating distribution that we can economize on by using HE, and we will not need to reconsider those same decisions later on down the road.[179] Of course, there is a lot of room for variation here. Redistributive rules might require many more rules to develop comprehensively, might require closer consideration of the remaining set of rules, or might be litigated, revised, or enforced more often. If one or more of those scenarios were true, then the decision-cost savings from HE might be small. But the reverse is also possible.

We could tell a similar story for lobbying and other transaction costs.[180] It is costly to organize a political coalition, convey the views of that coalition to lawmakers, and bargain with other coalitions and interested lawmakers for the coalition's desired outcomes.[181] Obviously there is a considerable amount of lobbying by groups who wish to avoid contributing to revenue collections.[182] The intuition here is that this lobbying is more intense, and draws in more interested parties, if a rule involves not only revenue but also a redistributive component. People may be more intensely motivated by questions of

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179. To see this more clearly, think of the tax code as a draft document with a vast index. We could update the index every time we make any edit to the document, on the chance that our edits have changed the pagination (which, in our analogy, is equivalent to changing the distributive consequences of the tax system). Alternately, we could update the index once, or perhaps monthly, to account for all the changes we have made since our last update. Unless monthly updates are thirty or more times as burdensome as daily updates, this strategy saves editorial effort.

180. *Cf.* Gregory Besharov, *A New Role for Horizontal Equity* 2–3 (Duke Univ. Econ. Working Paper No. 03-18, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=432380 (arguing that maintaining horizontal equity may reduce political conflict over potential departures from equitable outcome).

181. *See* CALABRESI, *supra* note 96, at 92–93 (identifying "legislative inertia" as a substantial obstacle in changing judge-made law); Martin Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process*, 68 TUL. L. REV. 803, 850–51 (1994) (discussing the difficulties associated with enacting federal legislation).

182. *See* Besharov, *supra* note 180, at 2 (defining "influence costs" as "resources consumed by taxpayers in their attempts to influence [tax] policy").

distributive justice.[183] Perhaps distributive justice touches on fundamental moral issues, many of which are of interest even to those who are neither paying nor receiving revenue. In addition, wealth or welfare may be a positional good; there is some data to suggest that many individuals are more motivated by where they stand relative to others than by income alone.[184]

Finally, more frequent redistribution is likely to increase transition costs, many of which may be hidden within the price of property. Redistributive rules create winners and losers.[185] Scholars of legal transitions in tax and elsewhere have shown that in a perfectly rational market in which the likelihood of rule changes that would decrease value was highly predictable, these gains and losses would probably be capitalized into the price of the affected goods.[186] Political change is seldom so certain, though, especially in a world in which seemingly irrelevant criteria such as the order in which policies are considered can change the outcomes of the policy choices.[187] Moreover, these scholars tell us that many individuals are risk-averse, even if somewhat diversified or capable of insuring against policy-driven losses.[188] In combination, the result

183. *Cf.* RAWLS, *supra* note 158, at 180–94, 475–80 (arguing that moral beliefs about justice are more fundamental than other policy disagreements).

184. *See* Fredrik Carlsson et al., *Do You Enjoy Having More Than Others? Survey Evidence of Positional Goods*, 74 ECONOMICA 586, 587–93 (2007) (summarizing other studies and setting out the results of an independent survey); *see also* ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 5 (1985) (offering one definition of wealth "as any income that is at least one hundred dollars more a year than the income of one's wife's sister's husband"); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 26–69 (1992) (describing generally how individuals measure themselves against one another and the effects of relative preferences on market equilibriums).

185. *See* Goetz, *supra* note 28, at 799–800, 804 (discussing the "rent-generating" feature of preferential tax provisions and how "bargaining power . . . determine[s] the disposition of the gain").

186. *Id.* at 800; Gordon Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671, 671–78 (1975). For example, if "capitalization" were complete, and we expected that there were a 40% chance of an event that would reduce a property's value by $10,000, the sale price of that property should decline by $4,000.

187. *Cf.* Goetz, *supra* note 28, at 804 (setting out factors that may lead to incomplete capitalization). On the vagaries of the political process, see generally Mathew McCubbins et al., *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994); John E. Roemer, *Distribution and Politics: A Brief History and Prospect*, 25 SOC. CHOICE & WELFARE 507, 510–13, 523–24 (2005). For more detail on the possibility that the ordering of choices changes the results of political contests, see Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEG. STUD. 259, 260 (1999); Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472, 472 (1976).

188. *See* Adler & Sanchirico, *supra* note 2, at 318 ("[S]trict concavity of *individual utility* for money translates into individual risk aversion with respect to money . . . ."); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 596 (1986) ("[B]ecause risk

of these phenomena may be that goods subject to frequent policy change may be undervalued relative to goods affected by more enduring law, the result being that the market for goods inefficiently shifts away from the more frequently regulated goods.[189] While government can cure this problem by offering compensation to those negatively affected by regulation,[190] the remedy may be worse than the disease. With the compensation comes another round of decisions and lobbying, by the end of which the compensation paid may not be especially close to the payment needed to give us an efficient market.[191]

Horizontal equity might reduce these inefficiencies. Again, the intuition here is that redistributive rules could be confined to a relatively small corner of the total universe of tax rules. The rules for extracting revenue from all of the market's manifold forms of wealth accretion would be much more extensive and particular. Thus, if we permit revenue decisions to redistribute, we incur the costs that flow from creating winners and losers more often. On the other hand, periodic corrections through purely redistributive provisions likely produce larger disruptions. It will be an empirical question whether frequency or size of change is a more important factor in creating inefficient changes.

Whatever the outcome of this tradeoff, avoiding redistribution in revenue taxation might mitigate transition costs in another way. Changes in revenue provisions will typically be made in piecemeal, affecting only a part of a taxpayer's portfolio at a time. This may produce inefficient shifts in the taxpayer's portfolio from one kind of property to another. For example, if there were redistributive effects inherent in the taxation of securities but not real

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aversion tends to decline as wealth increases, less wealthy individuals tend to give greater weight to the risk imposed by uncertainty concerning future government policy than do more wealthy individuals.").

189. *See* Barbara Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEG. ISSUES 123, 125–26 (2003) (arguing that consumers make calculations as to the risk of policy change before committing their resources to a good which might be affected by such policy change); *cf.* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1145–48 (1996) (arguing that, absent government guarantee that it will not act to reduce the value of its promises, those who contract with government will demand a high premium for the possibility of later opportunistic behavior by government).

190. *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 598 (1984) (offering compensation for adverse effects of government action as an alternative to private or government-based insurance schemes); Kaplow, *supra* note 188, at 531, 541 (suggesting that government compensation programs would increase the costs of long-term investment and would discourage investors from anticipating policy changes).

191. *See* Goetz, *supra* note 28, at 808 (noting that eliminating tax preferences to create "reform-with-compensation" programs might raise the total amount needed to satisfy those programs); Kaplow, *supra* note 188, at 615–16 (discussing the inefficiency of government compensation for adverse effects of policy reform).

property (or changes in these judgments were more frequent for securities), then we might see inefficient shifts towards real property.[192] In contrast, redistributive corrections might affect all of a taxpayer's forms of wealth equally.

Against these potential gains from avoiding redistribution we must set the possible danger of, in one common but colorful metaphor, the leaky bucket.[193] A number of commentators, including Kaplow and Shavell as well as Adler and Sanchirico, have addressed the general question whether redistribution should be integrated within each policy field or split out and conducted entirely within the tax system.[194] They note that if any given policy—say, tort law—is efficient but distributively unappealing, it can be corrected through later taxation.[195] But the process of bringing water from the overflowing pool to the dry well may itself involve spillage.[196] As noted earlier, these scholars have disagreed over whether this separation of redistribution from other substantive policy goals enhances welfare.[197]

Under at least some of these opposing views, there may be an argument that splitting revenue tax functions from redistributive tax functions would cause a decline in overall welfare. In particular, Sanchirico argues that redistributive corrections should be spread across many different policy instruments.[198] He notes that as a general rule, the more a policy deviates from its most efficient state, the greater economic distortions it will cause.[199] Thus, he argues that even if redistribution is confined solely to tax, it should be spread

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192. *Supra* notes 177–78 and accompanying text.

193. *See* Adler & Sanchirico, *supra* note 2, at 324–25 (explaining the transferability of utility and potential for reduction in total utility among individuals resulting from administrative costs or differences in marginal utilities between transferors and transferees). The author offers profound apologies to readers who now find themselves singing, "With what shall I mend it . . . ?"

194. *Supra* notes 66–67 and accompanying text.

195. Adler & Sanchirico, *supra* note 2, at 326.

196. *Id.* at 323–26.

197. *Supra* notes 66–67 and accompanying text.

198. Sanchirico, *supra* note 68, at 1022.

199. *Id.* at 1021–31. The optimal tax literature, for example, usually contends that deadweight loss triangles increase in proportion to the square of the distance from the optimal point on a graph of social costs and benefits, so that the size of the loss grows at an increasing rate as distortions increase. *See* GRUBER, *supra* note 68, at 582 ("[D]eadweight loss rises with the square of the tax rate ($\tau 2$), so that the distortion from any given amount of tax is greater as the existing tax rate increases."); *see also* Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 658 n.216 (1993) (providing an equation for measuring deadweight loss and a graphical representation of the tax effect on market supply).

widely throughout a tax system, rather than concentrated in a few provisions.[200] This is somewhat in tension with my suggestion here that there may be efficiency gains from reserving redistribution to a handful of tax rules. Which effect would predominate is not clear from theory.[201]

We could therefore construct a simple equation to summarize the welfare gains of HE. In actuality it will be difficult to put precise numbers on these figures. But we could likely get a good sense of the orders of magnitude of each effect. That, in turn, may give us a sense of whether HE is likely to dominate the welfare effects of policies that violate HE but themselves produce some welfare benefit.

This may be a counterintuitive result for some. Many of us typically think of principles of fairness as exceptions or correctives to, rather than products of, empirical measures of welfare. But that seems to be the clear implication of a thorough grounding of HE in welfare.

V. Equality of What?

At this point I have tendered at least a partial answer to the criticisms of the theories of Murphy and Nagel. But there remains the critique of Kaplow and others that horizontal equity is not useful unless we specify what it is we are supposed to be equalizing.[202] For example, Kaplow might argue that there are little or no decision cost savings to HE if we have to debate for each tax provision just which aspects of the existing distribution we ought to be preserving.[203] The theory of HE I have just set out, though, also suggests an answer to the question of the appropriate equilisand. To preserve neutrality among ends, and to collect revenue with a minimum of waste, we likely should strive to preserve the distribution of individuals' ability-to-pay, rather than their well-being.

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200. *See* Sanchirico, *supra* note 68, at 1028–29 ("Making tax rates cross-dependent is beneficial precisely because it allows us to further personalize the application of the tax system.").

201. *Cf. id.* at 1043–44 (noting that where there are fixed costs that must be incurred in order to employ each additional new policy instrument for redistribution, it may sometimes be the case that it would be better to avoid using some of the new instruments). However, it is difficult to predict when this would be true. *Id.* at 1045.

202. *Supra* notes 36–37 and accompanying text.

203. *See* Kaplow, *Search*, *supra* note 4, at 140 ("[I]f there is no normative basis for a measure of HE, efforts directed toward applying it are misspent and will lead policymakers astray when they are encouraged to sacrifice other values in the pursuit of HE.").

It is likely very difficult to maintain equality of welfare within a system that aims to be neutral in the political sense. Consider that the act of raising revenue and establishing the potential for delivering public goods of any kind may itself result in a spread of preference satisfactions among the population.[204] Some individuals may prefer small government and few public goods. Others might desire public goods, but delivered through a different medium, such as a different level of government or an NGO. The very act of collecting funds, then, will likely please some individuals and displease others.[205] Preference-satisfaction is an important component of utility.[206] Therefore, even if revenue is collected on a basis that strives to leave intact preexisting distributions of individual utilities, the architects must necessarily choose winners and losers. If we believe the neutrality case for HE, that is just what they ought not do.

My argument for ability-to-pay is therefore something of an argument by default. Ability-to-pay and utility are the two most developed theories of HE.[207] Utility, I argue, has a critical flaw. That leaves ability-to-pay as the last theory standing.

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204. *Cf.* Terrence Chorvat, *Taxing Utility*, 35 J. SOCIO-ECON. 1, 5–7 (2006) (noting that the choice to collect any tax causes different effects depending on the method by which the tax can be paid and individuals' preferences for paying with cash or kind); Crawford, *supra* note 52, at 179 (arguing that all tax systems, regardless of redistributive properties, embody "moral schemes").

205. I am grateful to Jon Klick for raising a version of this point.

206. *See* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 60–71 (1992) (describing, and probing the philosophical implications of, this view).

207. *See* Utz, *supra* note 25, at 940 (stating that there is no alternative to ability-to-pay other than utility). A number of scholars have debated the question whether taxpayers should be compared based on their consumption or their total income, which consists of consumption plus savings. *Compare* Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1092–1121 (1980) (rejecting the "superior fairness" of consumption tax and arguing for considerations of wealth when attempting to implement a fair tax policy), *and* Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 963–1017 (1992) (identifying several problems with the consumption tax and challenging its overall fairness as compared with the income tax), *with* Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, 58 STAN. L. REV. 1413, 1417–54 (2006) (arguing for taxation of consumption rather than income). That debate, though, is essentially a subset of the utility/ability-to-pay question, because a decision to tax only consumption still leaves open whether to measure consumption based on changes in welfare or changes in wealth.

In addition, there could be some argument that taxpayers should be compared based on the amount of benefits they receive from their government, rather than based on their own characteristics. However, this approach would result not in an income tax but instead in a system of user fees. *See* DODGE, *supra* note 1, at 401–06 (describing the benefit principle, its various forms, and problems related with taxation based on governmental benefits received). Thus, because my question is what norm best explains our present mode of taxation, which is an income tax, the "benefit" theory is largely off the table.

It might be argued in response that any decision to reject welfare as grounds for HE itself is not neutral, and will please or displease some individuals on that basis alone.[208] I want to avoid wandering too deep into the woods of what Rawls would say about the claims of those who resist the very concept of political neutrality. In general, though, the idea of a system that strives for political neutrality is that it entails a certain amount of sacrifice and tolerance.[209] Individuals with a strong view of the "best" political outcome must be willing to accept a second- or third-best result so long as that result is within the range of "reasonable" outcomes.[210] Moreover, this approach satisfies equality at a high level of abstraction in that it provides equal regard to everyone's political views, and over time in a fairly constituted government distributes an equal share of "best" outcomes to each of them.[211] If I am right, then, that the revenue function is properly a site for political neutrality, it should follow that welfarists, however momentarily disappointed by the failure of a tax system to implement their vision of welfare, would not have a legitimate claim of unequal treatment.

It is possible, though, that there is no convincing response to this point for someone committed to a deontological or a classically liberal approach to rights. Even then, however, I am still left with the welfarist claim that incomplete agreements create social value even while satisfying some members of society more or less than others. Further, as I will show momentarily, there is another strong argument for ability-to-pay that avoids the non-neutrality critique.

This is not to say that the ability-to-pay norm is without problems of its own. As tax theorists know well, there are important and difficult debates about how and when best to measure an individual's ability to pay.[212] We

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208. My thanks go to Curtis Bridgeman for raising this objection.

209. *See* RAWLS, *supra* note 118, at 446–47 (offering support for the notion that ideological integrity promotes the credibility of political action). Rawls wrote:

> [T]he idea of political legitimacy based on the criterion of reciprocity says: our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions . . . are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.

Id.

210. *Id.* at 479; *see also* SUNSTEIN, *supra* note 108, at 25 (noting deliberation as central to the furtherance of social pluralism).

211. *See* Rawls, *supra* note 107, at 142–43 (highlighting the importance of society's tolerance of numerous "public reasons" and the benefit of a flexible system that develops as society changes).

212. *See* McCaffery, *supra* note 69, at 84, 143 (identifying several weaknesses in tax structures based on "ability-to-pay" and "benefits received"); Daniel Shaviro, *Uneasiness and Capital Gains*, 48 TAX L. REV. 393, 407 (1993) (regarding HE formulas, which include only

could also disagree over whether interpersonal comparisons are the right way to think about ability-to-pay, or whether instead we should compare whole family units.[213] While these may be thorny questions, none of them strike me as fundamentally inconsistent with the revenue function in the way that utility theory appears to be.

Another critical point in favor of most ability-to-pay theories is that they offer us an observable outcome. Observability is important not only for obvious practical reasons, but also because of the underlying premises of HE. HE, as I have developed it, obliges us to strive to leave in place existing arrangements because we presume that those arrangements are the results of deliberate choices by others whose views we respect. It is rather implausible, though, that others could have seen and chosen a set of arrangements that are imperceptible to us.

While it is true that we can often infer individuals' preferences from their behavior, that fact does not entirely rescue utility from the observability problem.[214] For example, we can measure the point at which an individual trades off an additional dollar of income for an additional unit of leisure.[215] We cannot easily determine, however, the extent to which these observed preferences in fact represent true preferences, or whether they are the product of a person's own misperception of her own preferences or surroundings.[216] Some welfarists do not care about hidden or misperceived preferences, and would measure welfare based solely on revealed preferences; others disagree.[217] Since we might not know which version of welfarism may have been behind

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nominally "ability-to-pay," as failing to adequately define that metric and lacking support for its significance); Utz, *supra* note 25, at 939–49 (arguing that important determinations must be made before concept of ability-to-pay can reasonably promote equity in tax).

213. *Supra* notes 16–21 and accompanying text.

214. *Cf.* RAWLS, *supra* note 118, at 13 (arguing that attempting to measure individuals' utility or other similar concepts is "unworkable" because they are not "openly observable").

215. *See* George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76–77 (1977) (arguing that market decisions are the best evidence of individual preferences).

216. *See* Yew-Kwang Ng, *From Preference to Happiness: Towards a More Complete Welfare Economics*, 20 SOC. CHOICE WELFARE 307, 308–12 (2002) ("While few if any individuals are perfectly ignorant and irrational, some degrees of ignorance . . . and imperfect rationality clearly apply to most individuals . . . ."); *see also* John C. Harsanyi, *Utilities, Preferences, and Substantive Goods*, 14 SOC. CHOICE WELFARE 129, 131 (1997) ("[O]ur impulsive choices may not always agree with our true preferences. . . . [O]wing to a lack of will power, what we actually do may not be what we would really *prefer* to do.").

217. For overviews of the contrasting literatures, see MATTHEW ADLER & ERIC POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 28–39 (2006); THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 108–43 (1998); Lewinsohn-Zamir, *supra* note 68, at 338–53.

the choices that produced our existing arrangements, we in theory would be obliged to defer to both (absent some claim that either would be themselves obliged to tolerate a reasonable alternative, as I sketched above). Thus, we cannot know whether we will be able to measure the appropriate distribution, or whether that distribution was really the product of deliberate choice. It may follow that, even if we could guess at a distribution of real preferences, we would owe no deference to it.

Again, these problems are still present in ability-to-pay theory, but they are diminished. It may be a point of contention whether the appropriate basis for comparison is annual income, consumption, total wealth, or wealth modified by race, ethnicity, or gender.[218] We know, though, that all of these data points are likely to have been within the grasps of the individuals who created the existing arrangement. Therefore, there remains a strong inference that we owe deference to that arrangement. This point may be less true of certain versions of ability-to-pay, such as an estimate of ability-to-pay based on "endowment" or total lifetime earning potential.[219] That figure may be so close to imaginary as to merit no real inference that the distributions of potentials were set in place deliberately.[220]

Turning to welfare considerations, an ability-to-pay regime is rather easier to administer than one based in utility.[221] In the past, though, ability-to-pay proponents have had no especially resounding response to those welfarists who point out that focusing on ability-to-pay neglects obvious, easily measurable

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218. *See* Crawford, *supra* note 52, at 166–67, 187 (discussing several approaches to achieving equity in tax structure and arguing that incorporation of numerous perspectives encourages a comprehensive understanding of fairness); *cf.* Infanti, *supra* note 2, at 1195–1210 (criticizing scholars of horizontal equity who have overlooked the role of individual identity, apart from its impact on welfare or wealth).

219. *See* David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057, 1059 (2007) ("Taxation of endowments . . . presupposes the existence of a set of native faculties whose market value can be ascertained apart from their circumstances, yet it is not clear that this concept is coherent or defensible."); Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145, 1148–49 (2006) (noting the inherent difficulties of measuring endowment and potential earnings).

220. *Cf.* John Rawls, *Reply to Alexander and Musgrave*, 88 Q.J. ECON. 633, 647 (1974) (doubting whether potential lifetime earning capacity is measurable). *But cf.* Zelenak, *supra* note 219, at 1165–68 (considering whether the income tax can, under certain assumptions, duplicate the effects of a tax on endowments).

221. *See* DODGE, *supra* note 1, at 91 (noting that a tax structure based on ability-to-pay "has the overriding virtue of reducing, if not eliminating, potential areas of controversy relating to the tax base, which in turn should contribute to the stability of tax law"); Joseph M. Dodge, Zarin v. Commissioner*:* *Musings About Debt Cancellation and "Consumption" in an Income Tax Base*, 45 TAX L. REV. 677, 688–93 (1990) (noting the subjectivity in measuring utility and preferring a more objective metric in determining how best to tax gambling transactions).

welfare effects, as in the example of families with varying preferences for leisure.[222]

The ability-to-pay response, as I understand it, is a shrug. Since leisure time is not a good that can be collected by the government (absent forced labor), it should not factor into the measure of the tax base and therefore should be neglected in HE calculations.[223] While logical, that approach seems strongly contrary to what I suspect is a widely shared intuition that families with different childcare needs, but similar incomes and expenses, are not really identical.

The contribution of my approach is to point out that it is possible to correct for any perceived distributive flaws of the ability-to-pay approach within the tax system.[224] Remember that we are employing ability-to-pay only as a metric for the revenue function of the tax system. We are free to utilize a contestable, hard-to-measure value like interfamily utility once we have moved beyond revenue and gotten to redistribution. So, for example, we might define income without regard to family circumstance, but then be more generous in assignment of tax rates relative to income to those for whom we think the revenue approach was distributively unfair. Indeed, the special brackets for

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222. *See* Rosen, *supra* note 18, at 308–09 (providing one method of measuring total family utility by relying, in part, on metrics such as individual leisure of each family member).

223. *See* SIMONS, *supra* note 27, at 42 ("Income must be conceived as something quantitative and objective. It must be measurable; indeed, definition must indicate . . . an actual procedure of measuring."); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 367, 379 (1989) (discussing which items of consumption should be included in a formulation of "tax base" and noting Simons's view on the difficulties in measuring "the imputed value of leisure"); *see also* Warren, *supra* note 207, at 1096–97 (arguing that there is an ethical difference between taxing "things" and taxing their impact on human behavior, with the former as the more appropriate basis for taxation). In a sense, this approach adopts, without being quite explicit about it, the logic of the "incomplete agreement." As later commentators have argued, the central appeal to Henry Simons's approach to ability-to-pay is that it serves as an effective, if rough, compromise among several possible philosophical positions. *See* Utz, *supra* note 25, at 916–17 (outlining Simons's general perception of the many "puzzles" associated with various scholars' definitions of income as relevant to a basis for taxation).

224. Thus, my response to those who dismiss ability-to-pay as ignoring differences in utility, human needs, or the differential effects of race, gender, and orientation is to note that I am open to those arguments in the context of a redistributive tax. *See* Griffith, *supra* note 2, at 1158 ("Taxation according to cash income levels would ignore differences in needs. Taxation according to utility levels would require taxing non-monetary factors which affect utility, such as good health and a cheerful disposition.") (citations omitted); Crawford, *supra* note 52, at 162 ("[E]xcluding powerless voices or nonmonetized values from the analysis makes an implicit value judgment that these voices are not worth counting.") (citations omitted); Infanti, *supra* note 2, at 1195–96 (arguing that consideration only of economic differences represents an "insidious homogenization of the population"). However, I claim that the arguments are outside what should properly be the realm of consideration for HE.

those who are "married filing jointly" and "heads of household" reflect our attempts to do something quite like that.[225]

Thus, the underlying logic of my approach to HE also implies that HE should be measured with respect to ability-to-pay. Ability-to-pay is more likely to satisfy the requirement that there be a reasonable inference that the existing arrangements we find before tax are entitled to deference. Further, by isolating the case for HE to a special revenue function within the broader system of taxation, we open the possibility that any perceived distributive failings of ability-to-pay can be corrected within the tax system, albeit perhaps at the price of sacrificing some of the values that HE brings to the revenue-assessment process.

VI. Conclusion

I have tried to argue here for a distinctive, independent concept of tax fairness. Naturally, no persuasive concept can really be "independent" in the sense that it needs no other supporting claims to justify its appeal. As we have seen, what critics of HE have long contended is something more: Not only that we need arguments to support the normative appeal of HE, but also that there can be no fixed meaning of HE other than what is supplied by some comprehensive notion of distributive justice, or that there is no set of arguments that can justify the implications of a commitment to HE.[226]

Thus, I have attempted to show both the content of HE apart from simple distributive justice claims, and its potential normative appeal. HE embodies a measure of deference for the actual or implicit judgments of others in our society to whom we owe, or chose to grant, some regard. The obligation to render such deference derives, I claim, from our commitment to free and open deliberative democracy, and from the fact that tax revenue is instrumental to any such debate. Alternatively, we may choose to grant deference to others because our agreement to leave some questions closed may enhance overall societal welfare. This second consideration, too, depends somewhat on the notion that we are focused on the function of tax as a source of revenue, since it assumes that ultimately questions upon which there is fundamental dispute are

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225. *See* Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 4–11 (2000) (reviewing the history and development of taxation on married couples and noting the trouble in balancing progressivity in tax structure, marriage neutrality, and couples neutrality). *But cf. id.* at 3 ("[T]here really is no solution; there are only different ways of moving the problem around.").

226. *Supra* notes 30–59 and accompanying text.

irrepressible. But the idea is that we can limit the frequency and intensity of such debates by agreeing to agree about revenue.

I emphasize my focus on tax's revenue function for two main reasons. First, I want to highlight what it is I do not argue. Many critics of HE have complained that one of its principal failings is that it is a counterweight to the need for just redistributions, or that it ossifies the status quo and quashes innovation, by its suggestion that any effort at tax reform will upset existing distributions.[227] I agree that it would be hard to take seriously any concept of tax fairness that impeded efforts to make the tax system more distributively just, or to accomplish other needed policy goals.

Crucially, my version of HE does neither of these things, because it is concerned *solely* with tax's revenue function. HE makes no claims at all about the justice or efficiency of the existing distribution of goods in society. Indeed, the point of HE, in my view, is that it makes no such judgments. Thus, my version of HE should be welcomed by, for example, those who claim that HE has been a rhetorical shibboleth that has obstructed efforts to argue for greater social justice in the tax system.[228] HE sharpens, rather than blurs, our debates over matters of fundamental justice or good policy, because we now know that when a policy cannot be justified on HE grounds, its proponents must offer us one of the alternatives, and, reciprocally, that we cannot answer such policy arguments simply with a claim about HE.[229]

The other important implication of my focus on tax's revenue function is that it implies that HE may be a principle that is unique to tax. It is a fairly basic assumption in public finance that, for either HE or vertical equity, taxing and spending measures are interchangeable.[230] It makes no difference, the claim goes, if we tax Castor $100 and Pollux $50, as long as we later give Castor back $50 in government benefits. Several prominent theories, such as Graetz's gloss on the optimal taxation literature, depend on this claim in order to establish their respective approaches as consistent with HE.[231] However, the claim is very likely not true of HE as I have formulated it.

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227. *Supra* Part II; *see also* Kaplow, *Search*, *supra* note 4, at 147 (arguing that HE would seem to require a finding that all tax reform is inequitable).

228. *See, e.g.*, Infanti, *supra* note 2, at 21–40 (challenging generally popular notions of tax equity and fairness on grounds that certain underrepresented classes of individuals are unjustly affected by insensitive tax structures).

229. *See* RAWLS, *supra* note 118, at 216–18 (arguing that the cooperation of individuals necessary to create an operable society requires that all provide reasonable explanations of their respective ideologies).

230. GRUBER, *supra* note 68, at 13, 521–24.

231. *See, e.g.*, Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1953–54, 1966–67 (1987)

A key component of both of my justifications for HE is that all other subsequent government programs must be held constant for purposes of determining tax revenues. That is, while both require that allocations of revenue burdens respect prior government choices, they assume that we do not yet know, and may not be able to agree upon, *future* government benefits. From the deontological standpoint, revenue decisions must be neutral between the possibility that there may or may not be future benefits that will rearrange the tax burdens we assign. From the welfare view, debating the existence of later grants would be contrary to the aim of minimizing the amount of dispute that is required to formulate revenue policy. Thus, revenue taxation must be fair on its own terms; it cannot look to other government policies to rescue it from inequity.

Finally, my analysis suggests yet another potential limit on claims of tax fairness. My arguments depend heavily on the notion that we are engaged in tax planning for a single community with discrete revenue needs. That was the grounding for the argument that we owe due regard for the work done by others, or that we might reasonably agree with others in charting our common policy. Once we reach beyond our own community this grounding starts to get slippery. What respect, for example, do we owe to the existing distributions of goods chosen by other sovereigns? The concept of HE may be incoherent when it comes to comparisons between taxpayers in different jurisdictions, or, at least, comparisons that require us to decide the worthiness of those other sovereigns' views. Thus, for now I make no claim as to the power of HE to measure the effects of taxes levied on U.S. taxpayers by states, local governments, or foreign nations.[232] Quite possibly, HE has nothing whatsoever to say to those taxpayers.

(reviewing an optimal tax scheme and suggesting that redistribution of income would occur through "a demogrant rather than by graduated marginal rates"); Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 290–93, 299 (2002) (discussing the offset to payroll taxes for individuals with low income); Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 907–08 (1992) (claiming that inequitable state and local taxes can be rendered fair by inclusion of benefits flowing to taxpayers).

232. *See* 18 U.S.C. § 164 (Supp. V 2005) (providing a deduction for state and local taxes); *id.* § 27 (2000) (providing a foreign tax credit); *id.* §§ 901–907 (Supp. V 2005) (same).