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**Article**

**The Distributive Deficit in  
Law and Economics**

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## INTRODUCTION

Getting resources or entitlements into the right hands—those in which their highest value can be realized—can be costly.<sup>1</sup> The economic analysis of law is founded on this fact. Were it otherwise, there would be no need to concern ourselves with the efficiency of legal rules and institutions because costless transactions would set everything right in the blink of an eye.<sup>2</sup> Yet law and economics has neglected a feature of reality that is no less foundational than that of positive transaction costs: the large and variable costs associated with the *political* impediments that must be surmounted to achieve welfare-maximizing

1. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

2. See *id.* at 8; see also R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 14–15 (1988). If transaction costs were zero, legal rules could be selected based exclusively on distributive concerns—a point Stewart Schwab has dubbed “The Distributive Corollary of the Coase Theorem.” Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1195 (1989). Similar observations appear in James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 448 (1995); Zachary Liscow, *Reducing Inequality on the Cheap*, 123 YALE L.J. 2478, 2500–01 (2014); Michael J. Meurer, *Fair Division*, 47 BUFF. L. REV. 937, 943 (1999).

distributive results.<sup>3</sup> We argue that these *political action costs*<sup>4</sup> are significant, that they vary in knowable ways among types and methods of redistribution, and that perceptions of fairness, among other things, play a role in their magnitude.<sup>5</sup> Because both efficiency and distribution matter to welfare, the two impediments to its maximization—transaction costs and political action costs—should be treated in parallel fashion.<sup>6</sup>

Taking political action costs into account upends the now-conventional assumption that tax-and-transfer will always trump redistribution through other means. Because distributive outcomes can vary depending on the distributive route selected, welfarists cannot ignore maldistributions when evaluating legal rules.<sup>7</sup> Law and economics should attend not only to inefficiencies but also to *distributive deficits*—the degree to which a given distribution fails to maximize welfare for a given total quantity of wealth. Systematic neglect of these distributive shortfalls has led to a scholarly deficit in the economic analysis of law.

Consider a standard example in which a court must decide whether to allow a factory to pollute to the detriment of nearby neighbors. The efficiency case for assigning the pollution enti-

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3. We use the shorthand “welfare-maximizing” to refer to maximization based on whatever social welfare function has been specified, which might mean maximizing the sum or product of all individual utilities, the utilities of the least well-off, or something different.

4. See *infra* text accompanying notes 92–96 (providing a taxonomy of these costs). These costs are distinct from the technical or administrative challenges involved in adjusting distribution, such as the costs of assessing or collecting taxes. For a discussion of administrative costs, see *infra* note 31.

5. We are not the first to note the potential implications of political costs for law and economics. See, e.g., Richard S. Markovits, *Why Kaplow and Shavell’s “Double-Distortion Argument” Articles Are Wrong*, 13 GEO. MASON L. REV. 511, 556–57, 597–601 (2005); Brett H. McDonnell, *The Economists’ New Arguments*, 88 MINN. L. REV. 86, 111 (2003); Cass R. Sunstein, *Willingness to Pay vs. Welfare*, 1 HARV. L. & POLY REV. 303, 314–15 (2007). However, the role of political impediments that might apply differentially to different modes of redistribution has been widely underappreciated.

6. See A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer’s Guide to Posner’s Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1665–69, 1676–81 (1974) (critiquing Posner’s focus on the falsity of the zero transaction cost assumption to the exclusion of other artificial assumptions, including costless redistribution). Although Polinsky focuses on the distortive effects of taxes rather than their political costs, his critique emphasizes, as we do here, the importance of treating all impediments to welfare maximization in like fashion.

7. Except as otherwise specified, we will use the term “legal rules” in this Article to refer to *non-tax* legal rules and policies, whether enacted by legislative or administrative bodies or adopted by courts.

tlement to the party who values it most highly is premised on the fact that rearranging the entitlement post-judgment (which would require a private transaction) could be prohibitively costly. Yet little attention is given to the fact that reordering *distribution* post-judgment (which would require a political act) may also be prohibitively costly.<sup>8</sup> If the political acts required to achieve a desired distributive result were understood to be costly while the transactions required to achieve a desired allocative result were deemed to be trivial, the standard prescription would flip: now addressing distribution would become the priority, and efficiency the afterthought. In fact, both sets of costs are significant, both matter to welfare, and neither can be defensibly ignored.

If we pay as much attention to political action costs as we do to private transaction costs, we will end up questioning an important tenet of conventional economic wisdom. Suppose a court facing the factory dispute above finds that distributive and efficiency considerations point in opposite directions.<sup>9</sup> Should the court weigh the efficiency effect on welfare against the distributional effect on welfare—for example, choose a slightly less efficient rule that will avoid generating large distributive deficits? Conventional law and economics says no: the judge should decide the rule solely on grounds of efficiency and leave distribution to the tax-and-transfer system, because doing so will generate fewer behavioral distortions.<sup>10</sup>

On this view, any distributive deficit associated with the court's ruling can be better addressed through the tax system.

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8. The primary cost associated with redistribution that receives attention from legal economists is the labor-leisure distortion. But because this is thought to be common to all distributive efforts, including those built into legal rules, it is not viewed as uniquely attaching to the redistributive effort contemplated in the text. Administrative costs are also understood to exist but are given limited attention on the supposition that they will be lower for tax-and-transfer than for doctrinal methods of redistribution. *See infra* note 31.

9. Although we focus on a court for purposes of this simple illustration, the same point applies to any other institutional actor who is faced with a choice about whether to take distributive considerations into account in formulating substantive (non-tax) legal rules. There may well be institutional reasons to prefer one actor over another for certain kinds of decisionmaking, but those considerations are orthogonal to the question that is at the heart of our analysis here: whether law and economics should remove distributive considerations from the evaluation of all substantive legal rules.

10. In brief, the labor-leisure distortion is thought to attend all redistributive efforts, while inefficient redistributive legal rules additionally distort behavior in the domain to which the rule applies. *See infra* notes 25–29 and accompanying text.

For this to *always* be the case, however, it is not enough to show that tax-and-transfer minimizes the behavioral distortions associated with redistribution;<sup>11</sup> instead, tax-and-transfer must perform better overall at achieving distributive shifts, after the political action costs of achieving the desired distributive changes are taken into account. It is plausible that the presence of political action costs would necessitate second-best methods of governmental redistribution,<sup>12</sup> just as positive transaction costs will cause private parties to adopt second-best contracts when transaction costs block the first-best. “Political failure,” no less than “market failure,” can thwart efforts at welfare maximization.

Omitting political failure from the analysis requires accepting a crucial but rarely articulated claim that we term “the invariance hypothesis”: that any political failure that exists for tax-and-transfer must inevitably plague non-tax methods of distribution to at least the same degree—whether because the other legal actors are themselves subject to the same political constraints, or because their distributive efforts will be offset by the legislature. If this were true, political failure would make any shortfalls in redistribution inevitable regardless of what distributive methods were employed, so we would still do best to leave redistribution to tax-and-transfer (however inadequately it might accomplish the task). But, as we will show, the invariance hypothesis is not true.

This Article makes three claims, corresponding to its three Parts. In Part I, we show that law and economic analysis embeds a distributive invariance hypothesis that the same distributive result will be achieved regardless of how legal rules are configured or how entitlements to resources are assigned.<sup>13</sup>

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11. See *infra* Part I.A (discussing the principle of tax superiority and the “extra distortion” argument).

12. See, e.g., Liscow, *supra* note 2, at 2508 (“[I]f transfers are unavailable in practice, their theoretical availability is irrelevant; as a result, the legal rule should adopt the second-best policy of taking equity directly into account . . . .”); see also MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 144–45 (2006) (suggesting that an administrative agency might at times be able to improve “overall well-being” through attention to distributive impacts where tax-and-transfer will not occur, and observing that “if this result is welfare inferior to an alternative that is politically impossible, that is irrelevant”). Although any tax system based on income is already firmly in the realm of the second-best, the claim of tax superiority assumes a first-best political situation, by ignoring the real-world political resistance to the income tax.

13. This hypothesis sometimes appears in the literature as a modeling assumption that is understood to possibly or definitely depart from reality; at

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This invariance hypothesis rests in turn on an unstated assumption that political action costs for tax adjustments are equal to or less than for any other method of distributing the same quantum of income.

In Part II, we argue that the invariance hypothesis is false. Political action costs for redistribution are not only frequently large, they also vary dramatically among contexts for a variety of reasons—including political inertia, interest group politics, framing, and real or perceived conformity with background notions of fairness. As a result, legal rules may be able to achieve and maintain distributive results that tax-and-transfer cannot. By the same token, choosing efficient legal rules over less efficient ones may introduce unwanted distributive side effects that tax-and-transfer cannot or will not correct.

In Part III, we argue that attending to political action costs leads to different conclusions about how welfarists should approach the task of designing legal rules and institutions than those that are currently dominant in law and economics. Welfarists working in law and economics should give the role of political action costs in sustaining distributive deficits attention on a par with that already given to the role of transaction costs in impeding efficient results. There should be broad recognition within law and economics of the falsity of the invariance hypothesis and the associated possibility that legal rules can have durable, welfare-relevant distributive consequences. Legal rules are thus not axiomatically inferior to tax-and-transfer as a means of achieving or maintaining desired distributive results—though they may be so in many domains as an empirical matter.

Our project's significance goes beyond adding to the debate over the best way to redistribute, however. It also focuses attention on the phenomenon of distributive variance, or multiple distributive equilibria, within a political system. Not only does this phenomenon warrant study as a positive matter, it also raises interesting normative questions for welfarists. A desire to glean the benefits of a less distortionary (or otherwise preferred) redistributive method should spur interest in mechanisms for addressing distributive variance—such as rules or policies that would make doctrinal choices with distributive implications conditional on corresponding tax adjustments.<sup>14</sup>

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other times, it is cast as an empirical claim about the way distributive results are actually accomplished. *See infra* Part I.C.

14. *See infra* Part III.C.3. For example, a shift to congestion pricing of

## I. IDENTIFYING THE INVARIANCE HYPOTHESIS

The hypothesis of distributive invariance that we identify here plays an important but underappreciated logical role in supporting what has become the conventional wisdom about distributive matters. The standard advice—to ignore distribution in choosing and formulating legal rules—holds only if it is true that society will always end up in the same distributive place regardless of the redistributive methods or mechanisms selected. This assumption of a single distributive equilibrium requires, in turn, strong assumptions about the costs of political action in the distributive realm.

To see where the invariance hypothesis fits into the conventional analysis, it is first necessary to distinguish between two claims about the relative desirability of redistributing through tax-and-transfer, both of which have been associated with the work of Louis Kaplow and Steven Shavell (K&S).<sup>15</sup> The first, which we do not take issue with here, is their formal result that for any increment of redistribution that a society might wish to achieve, the tax-and-transfer system can achieve it at a lower cost in behavioral distortion than can a legal rule.<sup>16</sup> An implication of this result is that if both methods of

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road use might be made conditional on the tax system adjusting its progressivity to preserve distributive neutrality.

15. Kaplow and Shavell develop these ideas in both joint and solo work. The primary articles in this vein are Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) [hereinafter Kaplow & Shavell, *Legal Rules*]; Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) [hereinafter Kaplow & Shavell, *Less Efficient*]; Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rule-making: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414 (1981); Louis Kaplow, *The Optimal Supply of Public Goods and the Distortionary Cost of Taxation*, 49 NAT'L TAX J. 513 (1996) [hereinafter Kaplow, *Public Goods*]. For the related public finance literature on commodity taxation, see A.B. Atkinson & J.E. Stiglitz, *The Design of Tax Structure: Direct Versus Indirect Taxation*, 6 J. PUB. ECON. 55 (1976); Emmanuel Saez, *The Desirability of Commodity Taxation Under Non-Linear Income Taxation and Heterogeneous Tastes*, 83 J. PUB. ECON. 217 (2002). Although we will focus on K&S for convenience, because their position has become mainstream among law and economics scholars, we take ourselves to be critiquing the approach as a whole and not just these scholars in particular.

16. See Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 669 (“[G]iven any regime with an inefficient legal rule (notably, one intended to help achieve a redistributive goal), there exists an alternative regime with an efficient legal rule and a modified income tax system in which all individuals are better off.”); see also *id.* at 677–81 app.; Shavell, *supra* note 15, at 416. This is not to say that we necessarily agree with the claim of formal tax superiority in all

redistribution are equally available and all else is equal, the tax-and-transfer method of redistribution is superior. We refer to this result as the principle of *formal tax superiority*.

The second claim, which we term *prescriptive tax superiority*, moves from the formal result to this policy prescription: ignore distributive considerations except when setting tax-and-transfer policy.<sup>17</sup> As we shall demonstrate, the leap from formal tax superiority to prescriptive tax superiority cannot be made without the logical step provided by the invariance hypothesis. For it to always be the case that formal tax superiority implies prescriptive tax superiority, it must also be the case that there are no distributive outcomes that are uniquely achievable through non-tax means—in other words, that one will never be able to improve the distributive result under real-world political conditions by shifting to a different mode of distribution.

We begin by describing both formal tax superiority and prescriptive tax superiority. We then show how prescriptive tax superiority assumes invariance.

#### A. TWO PRINCIPLES OF TAX SUPERIORITY

Kaplow and Shavell famously argue that tax<sup>18</sup> is strictly superior to legal doctrine as a means of redistributing income.<sup>19</sup> They were not the first to make this claim, but they very cogently developed and defended the idea in a series of articles now well known within law and economics. As suggested already, the assertion of tax superiority comprises not one claim but rather two distinct claims, with very different implications. K&S's formal result is the superiority, in principle, of tax as a means of distribution, i.e., that it is possible to achieve any given distributive outcome more cheaply, in terms of behavioral

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respects, only that we are taking it as true for purposes of this Article.

17. See, e.g., Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 677 (“This [extra distortion] argument, along with others that are more familiar, suggests that it is appropriate for economic analysis of legal rules to focus on efficiency and to ignore the distribution of income in offering normative judgments.” (footnote omitted)).

18. We use the term “tax” in this Article interchangeably with “tax-and-transfer” to encompass transfer payments.

19. See, e.g., Kaplow & Shavell, *Less Efficient*, *supra* note 15. K&S do qualify this claim in some respects. Kaplow & Shavell, *Legal Rules*, *supra* note 15, at 821, 825–34. For the most part, these qualifications are highly technical and not relevant to the discussion here. K&S's treatment of the issue at the heart of our analysis—the possibility that distribution may be changed by other legal actors in a way that Congress does not offset—is detailed extensively below. See *infra* Part I.C.



distortions, through tax than through legal doctrine. Distinct from this point is the categorical policy advice that has become associated with their work: that outside of tax, welfarists should ignore the distributive consequences of legal rules.<sup>20</sup> It is this policy advice—prescriptive tax superiority—that we take issue with here.<sup>21</sup>

The advice to ignore distribution in formulating legal rules is strikingly counterintuitive and provocative because (however surprising to some non-economic theorists) welfare economics places great significance on distribution.<sup>22</sup> Distribution matters to welfare maximization in potentially two ways. First, distribution of wealth or other resources can affect individual welfare for a variety of reasons. The most general point is the declining marginal utility of money, which means that moving a dollar from the rich to the poor will typically increase the welfare of the poor more than it diminishes the welfare of the rich.<sup>23</sup> Second, social welfare functions may aggregate individ-

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20. See, e.g., Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 677.

21. We believe it is a fair reading of K&S's work to attribute to them at least a qualified claim of prescriptive tax superiority (and not just formal tax superiority), as explained below. But nothing in our argument depends on proving that they actually hold this view. Our point instead is to show that prescriptive tax superiority is, on the merits, an untenable position for law and economics to take, given its reliance on the invariance hypothesis.

22. The maximization of welfare or well-being, which is generally quite sensitive to distribution, must be distinguished from the maximization of wealth, which is not. Although wealth maximization was for a time famously advocated by Richard Posner, he subsequently stepped away from that view, and our sense is that few scholars align themselves with that approach today. See Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POLY 85 (1985) (offering a qualified defense of wealth maximization); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 98–101 (2001) (identifying “the dependence of market outcomes on the distribution of wealth” as the primary flaw in wealth maximization); see also Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1052–53 n.7 (2007) (“Posner’s attempt to vindicate wealth-maximization as a theory of justice has not found much success, and Posner himself has abandoned it . . .”). Although wealth maximization (i.e., efficiency) certainly continues to inform the analysis of substantive law, see Purdy, *supra*, most law and economics scholars envision combining that approach with redistribution through the tax-and-transfer system to pursue the ultimate maximand of welfare.

23. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 30 (2002). There are numerous other channels through which distribution might influence utility, including crime and unrest, although the evidence is often mixed on these effects. See, e.g., Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23 (2010) (discussing contested empirical and theoretical literature finding that inequality increases crime and constrains economic growth); Richard A. Posner, *The Constitution as an Economic*

ual welfare in a manner that makes the distribution of utility or well-being itself relevant. One may plausibly choose a non-utilitarian social welfare function that gives some weight to the greater equality of welfare.<sup>24</sup> K&S dispute neither point. Their argument is one of means rather than ends: given the end of increasing (or decreasing) income equality, the best means is tax.

When K&S first jointly proposed the distributional superiority of tax in 1994, they could plausibly state that they were writing against the conventional wisdom of lawyers and law professors: that legal doctrine offered a superior means of redistributing because it avoided the distortion of labor-leisure decisions.<sup>25</sup> K&S argued that this line of reasoning was erroneous: if doctrinal rules operate like a tax by redistributing wealth from the rich to the poor, people will notice themselves earning a lower return on their labor as their income rises, and

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*Document*, 56 GEO. WASH. L. REV. 4, 23 (1987) (“[A] good deal of compelled redistribution of wealth may be the cheapest method of preserving social peace and so may be cost-justified; plausible examples are pro-union legislation designed to head off labor violence, [and] generous welfare allotments designed to head off riots in the slums . . . .”); see also Emily Underwood, *Can Disparities Be Deadly? Controversial Research Explores Whether Living in an Unequal Society Can Make People Sick*, 344 SCIENCE 829 (May 2014), [http://www.fammed.wisc.edu/applications/chpp/documents/publications/Population\\_Health/Underwood\\_Can%20Disparities%20be%20Deadly.pdf](http://www.fammed.wisc.edu/applications/chpp/documents/publications/Population_Health/Underwood_Can%20Disparities%20be%20Deadly.pdf) (examining contested evidence that widespread inequality causes a variety of negative health effects); Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235, 267–74 (discussing various costs poverty imposes on society, including inefficiencies associated with unequal opportunities, aesthetic disutility, and costs arising from interdependent utility functions); Juan José Ganuza & Fernando Gómez, *Realistic Standards: Optimal Negligence Rule Under Limited Liability*, 37 J. LEGAL STUD. 577, 589–90 (2008) (observing that downward adjustments in first-best due care levels are required for optimal deterrence when those in the relevant population lack assets sufficient to cover the potential harm). See generally RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (2009) (presenting comparative data on the costs of inequality in multiple domains).

24. A utilitarian social welfare function seeks to maximize the sum of individual welfare levels, but plausible alternatives involve more complex functions, such as maximizing the sum of the square roots of individual welfare levels, which would have the effect of valuing equality of welfare.

25. See, e.g., A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1084–85 (1980) (suggesting that a remedial choice might be a less expensive way to redistribute, and observing that “[d]ue to the substantial distortions in work effort, redistribution through the tax system would be quite costly in terms of efficiency”).

the same labor-leisure distortion will occur.<sup>26</sup> If both tax and legal doctrine distort the labor-leisure decision to the same degree, tax then has the advantage of avoiding the additional distortion created by any deviation from efficient legal rules.<sup>27</sup> Notwithstanding some cogent rejoinders to this extra distortion argument,<sup>28</sup> we accept it as accurate for purposes of our discussion here; our arguments apply whether it is true or false.<sup>29</sup>

Our analysis focuses on the move from the extra distortion argument to the policy recommendation that, even though distribution matters to social welfare, legal doctrine should focus exclusively on efficiency.<sup>30</sup> This claim of prescriptive tax superiority assumes distributive invariance (as we show below), or equivalently, that there are no other costs in the picture that

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26. See, e.g., Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 667–68. This equivalence has been disputed. See, e.g., Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998) (arguing that legal rules may be less distortive due to cognitive biases); see also Liscow, *supra* note 2 (arguing that distortions to labor-leisure can be avoided or mitigated by applying rules that distribute entitlements based on group membership that correlates with income levels rather than on individual income levels); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 800 (2000) (arguing that the extra distortion argument does not apply to “income-independent, equity-motivated deviations from efficient legal standards”).

27. This argument is undermined to the extent that real-world tax-and-transfer systems embed design choices that can add distortions beyond labor-leisure, including choices about family composition and residential location. These potential distortions have, of course, been staples of discussions about transfers to low-income people for decades. For a recent discussion, see Scott Sumner, *Guaranteed Annual Income: Let’s Talk Numbers*, THEMONEYILLUSION (Sept. 27, 2014), <http://www.themoneyillusion.com/?p=27639>. As K&S recognize, the matter is also more complex than simply counting the number of distortions, because one distortion might offset rather than add to another distortion. Thus, for example, a behavioral distortion that led someone to consume less of a good that is strongly complementary to leisure might offset rather than add to the labor-leisure distortion. Kaplow & Shavell, *Legal Rules*, *supra* note 15, at 825–26.

28. See, e.g., Jolls, *supra* note 26; Liscow, *supra* note 2; Markovits, *supra* note 5; Sanchirico, *supra* note 26.

29. It should be noted that K&S’s “extra distortion” (or “double distortion”) argument represents an intuitive expression of formal tax superiority that differs from, and is less qualified than, K&S’s formal model. The difference between these two ways of expressing formal tax superiority does not matter for our purposes, however. Our quarrel here is not with formal tax superiority at all, but rather with the claim that redistribution can always be achieved to the same degree through tax alone. We thank Chris Sanchirico for discussions on this point.

30. See Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 677.

might vary in a way that would favor a non-tax method of distribution.<sup>31</sup>

Our sense today is that both the K&S result and the policy advice have become the conventional wisdom, at least among many law professors who employ economic analysis.<sup>32</sup> Both the

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31. Administrative costs receive some attention from K&S. *Id.* at 675 n.12 (“[A]lthough we did not consider the possible additional administrative costs of increasing the amount of redistribution through the income tax, it seems plausible that these costs would be less than those of achieving significant, well-targeted redistribution through legal rules.”); Kaplow & Shavell, *Legal Rules*, *supra* note 15, at 834 n.30 (“Nor do we address administrative costs, which would seem to be an important factor that weighs against using legal rules to attempt to redistribute *significant* amounts of income.”); *see also* Markovits, *supra* note 5, at 608–10 (discussing and critiquing K&S’s neglect of this topic). A somewhat longer discussion of administrative costs appears in STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 656–67 (2004) (acknowledging that administrative costs of the tax system are nontrivial and suggesting that the costs of legal rules blend together high administrative cost elements such as litigation with low administrative cost elements like influencing behavior via deterrence). Because our primary focus in this Article is on political action costs, we do not focus on administrative costs but note only that they represent another reason for doubt about the unqualified claim of tax superiority. *See* Tomer Blumkin & Yoram Margalioth, *On the Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1, 11–14 (2005) (arguing that administrative costs might favor redistributing through non-tax rules); David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1 (2014) (discussing the severe problem of tax-avoidance behavior and the possible advantages of redistributive legal rules in being more difficult to “game”). *See generally* Walter Perrin Heller & Karl Shell, *On Optimal Taxation with Costly Administration*, 64 AM. ECON. REV. (PAPERS & PROC.) 338 (1974).

32. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 112 (3d ed. 2000) (presenting administrative and extra-distortion arguments for preferring progressive income taxation over redistributive assignment of property rights and concluding that “economists who favor redistribution and economists who oppose it can agree that property law is usually the wrong way to pursue distributive justice”); Ronen Avraham et al., *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1126 (2004) (describing “a view [among economists] that has become the new conventional wisdom: that income (or wealth) redistribution is *always* better accomplished through the tax-and-transfer system than through the legal system”); Blumkin & Margalioth, *supra* note 31, at 2 (noting that the K&S stance on tax superiority “seems to be the prevailing norm in the law and economics literature”); Liscow, *supra* note 2, at 2480 (“Kaplow and Shavell’s analysis supports what is perhaps the central tenet of law and economics, namely that legal rules should be designed based on their efficiency consequences.”); Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 158 (2003) (“[W]e believe it is a safe bet that a majority of legal economists hold the following view: Whatever amount of redistribution is deemed appropriate or desirable, the exclusive policy tool for redistributing to reduce income or wealth inequality should always be the tax-and-transfer

formal and prescriptive claims of tax superiority have been the subject of numerous critiques.<sup>33</sup> However, to our knowledge, our Article is the first to address head-on the crucial logical link of distributive invariance that connects the formal and prescriptive versions of tax superiority.

It is useful to briefly consider how K&S's extra distortion argument for tax superiority fits into other arguments against using non-tax legal doctrine to redistribute income. First, legal rules may actually fail to affect distribution in the desired direction due to private-party adjustments along other dimensions. For example, a living wage or rent control law may not help the poor, if employers or landlords can adjust other terms of the employment or landlord-tenant bargain.<sup>34</sup> This is the futility or "contracting around" objection.<sup>35</sup> Second, redistributive

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system."); Robert C. Ellickson, *The Affirmative Duties of Property Owners: An Essay for Tom Merrill*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 43, 66 (2014) ("[M]ost law-and-economics scholars . . . conclude that distributive goals are better pursued by means of broad tax and welfare programs than by the introduction of distributive considerations into the rules for resolving ordinary private law disputes." (footnotes omitted)). It is not only those within law and economics but also those standing outside of it who view the K&S prescription as central to law and economics. See, e.g., Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 468 (Peter Newman ed., 1998) (presenting tenets of the "mainstream" law and economics approach, which include having courts pursue efficiency and leaving distribution to the legislature through tax-and-transfer).

33. E.g., Avraham et al., *supra* note 32; Blumkin & Margalioth, *supra* note 31; Nicholas L. Georgakopoulos, *Exploring the Shavellian Boundary: Violations from Judgment-Proofing, Minority Rights, and Signaling*, 3 J.L. ECON. & POL'Y 47–62 (2006); Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326 (2006); Liscow, *supra* note 2; Markovits, *supra* note 5; Noah Popp, *Wealth Versus Welfare: Correcting for the Marginal Utility of Wealth in Assigning Private Law Entitlements*, 30 QUINNIPIAC L. REV. 69 (2011); Sanchirico, *supra* note 26; Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001) [hereinafter Sanchirico, *Efficiency Rationale*].

34. See, e.g., Chi. Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 741 (7th Cir. 1987) (Posner, J., concurring) ("Landlords will try to offset the higher cost [associated with Chicago's landlord-tenant ordinance] by raising rents."). A related point is that poor people may be harmed by behavioral distortions produced by such legal rules, if, for example, fewer jobs or apartments are made available by employers or landlords—although the empirical evidence on such issues is often unclear. See, e.g., Liscow, *supra* note 2, at 2498 n.46 (noting mixed empirical and theoretical findings on the extent to which the minimum wage reduces employment or manages to redistribute).

35. See, e.g., David A. Weisbach, *Should Legal Rules Be Used To Redistribute Income?*, 70 U. CHI. L. REV. 439, 448–49 (2003); see also *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 282 (7th Cir. 1992) (Posner, J.) ("The idea that favoring one side or the other

legal rules not precisely tied to income can only roughly redistribute in the desired direction—say, from rich to poor—while sometimes pushing money in the wrong direction. This problem of “leakage” is one facet of what is sometimes termed “the haphazardness objection” to redistributive legal rules.<sup>36</sup> Another facet of that objection goes to the underinclusiveness of attempting to redistribute through rules that will only directly impact a small subset of people in a given income bracket—those who happen, for example, to suffer injury at the hands of a tortfeasor.

These arguments depend on deeply contextual inquiries. Not all doctrinal efforts to redistribute are futile.<sup>37</sup> Arguments premised on underinclusiveness may fail to take into account the way that legal rules shape conduct and expectations outside the courtroom.<sup>38</sup> And overinclusiveness is neither unique to

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in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power.”). However, the concern that redistributive efforts will be wholly or partially undone by market adjustments is not unique to legal rules. *See* Liscow, *supra* note 2, at 2497–500 (discussing the potential incidence-shifting effects of redistributive efforts undertaken through tax as well as through legal rules, and citing research indicating that the Earned Income Tax Credit depresses wages by pushing more workers into the work force, thus diluting the redistributive effect).

36. *See, e.g.*, Weisbach, *supra* note 35, at 449 (referring to problems of both underinclusion and overinclusion as “the haphazardness problem”); *cf.* David A. Weisbach, *Distributionally Weighted Cost-Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. LEGAL ANALYSIS 151, 170–71 (2015) [hereinafter Weisbach, *Distributionally Weighted Cost-Benefit Analysis*] (observing that redistribution through agency action will reach only those markets that happen to be subject to agency regulation).

37. *See, e.g.*, Weisbach, *supra* note 35, at 449 (noting theoretical and empirical difficulty of determining effects of legal rules and concluding “that some probably help their intended beneficiaries, and some probably do not”). If redistribution through legal rules were always illusory, there would be no need to consider K&S’s extra-distortion argument, nor our discussion in this paper of political action costs. Redistributive legal rules, like unicorns, would be wholly imaginary phenomena. But no one, including K&S, thinks it is literally impossible for any redistribution to occur through legal rules or doctrines outside of tax law.

38. Legal rules may operate to the benefit or detriment of income classes through deterrence effects, even if relatively few members of those income classes wind up in court. *See* Logue & Avraham, *supra* note 32, at 185–86. For example, making tort recovery sensitive to actual lost income might be expected to yield less careful driving in low-income neighborhoods or less careful treatment of low-income patients, whereas averaging income would tend to equalize the deterrence effects across income classes. *See* Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 97–99 (2011). It is also unclear that redistribution through private law as a whole, which includes contract and property doctrines as well as tort law, would be any less inclusive than redistribution through tax law. Sanchirico, *Efficiency Rationale*, *supra* note 33, at

doctrinal redistribution<sup>39</sup> nor always without its countervailing virtues.<sup>40</sup> As a result, neither contracting around nor haphazardness provides a universal argument for tax superiority. This is where K&S's extra-distortion argument comes in to (ostensibly) deal the knock-out punch, providing an across-the-board reason to disfavor redistributive legal rules.<sup>41</sup>

The idea that distributive changes are always best pursued through the tax system thus supports a strict division of labor in which those charged with formulating legal rules use efficiency as their maximand.<sup>42</sup> This is, at any rate, the conventional understanding of K&S's proof.<sup>43</sup>

We wish to illustrate how the policy advice works in practice. Consider first some examples<sup>44</sup> from the work of courts:

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1052. Finally, even within tort law, redistribution is made more comprehensive through insurance, which “transmutes the haphazard into the definite.” *Id.*; see also Logue & Avraham, *supra* note 32, at 186–88.

39. In fact, tax law itself (as it exists on the ground) is riddled with exceptions and examples of poor targeting. See Weisbach, *supra* note 35, at 452 (observing that the tax system is “riven with loopholes” but suggesting legal rules would be no better and “could easily be much worse”); see also Gamage, *supra* note 31 (examining the implications of “tax gaming”). There are also important debates about whether income offers a sufficiently good measurement of well-being to serve as the basis for targeting in the first place. See Sanchirico, *supra* note 26; see also Liscow, *supra* note 2, at 2502–09 (suggesting that some redistributive efforts may be better targeted based on some non-income measure of desert or need, rather than income).

40. See, e.g., *infra* notes 110–11 and accompanying text (noting potential political advantages of imperfect targeting or “leakage”).

41. See, e.g., Avraham et al., *supra* note 32, at 1127 (“Louis Kaplow and Steven Shavell made what seemed to be a decisive argument regarding the use of redistributive legal rules. They argued that income redistribution is *always* more efficiently accomplished through the tax-and-transfer system, even if the contracting-around and haphazardness issues are placed aside.”).

42. This division of labor tracks the First and Second Fundamental Theorems of Welfare Economics, as well as the more prosaic admonition to separate pie maximization from pie slicing. See, e.g., Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 817 n.21 (2005) (referencing “the argument of Louis Kaplow and Steven Shavell, tracking the two welfare theorems, that the general legal system should be evaluated vis-à-vis the goal of welfare maximization or allocative efficiency, leaving the tax system to redistribute wealth”); Meurer, *supra* note 2, at 941–42 n.28 (1999) (explaining how law and economics “bifurcates efficiency and fairness analysis of the law” and describing the “usual attitude . . . that law should be shaped by efficiency concerns, and [that] the legislature can achieve fairness through taxation and spending policies”); see also A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (4th ed. 2011) (“[E]fficiency corresponds to ‘the size of the pie,’ while equity has to do with how it is sliced.”).

43. We say this with some confidence, having reviewed scores of citations to K&S on this point appearing in articles published from 2005 through 2013.

44. The examples provided here and elsewhere in the Article are offered

*Tort Recovery.* A judge is deciding whether to award damages for lost income based on the particular plaintiff's actual expected income (the tailored rule) or based on the average expected income of people in the same age cohort living in the community (the untailored rule). The tailored rule (which is standard practice) would favor higher income people over lower income people, while the latter would have the opposite effect.<sup>45</sup> The tailored rule arguably carries an efficiency advantage in settings where the income levels of the potential victims are known to the potential injurer.<sup>46</sup>

*Arbitration Clause.* An appellate court is deciding whether to enforce or invalidate an arbitration clause in a standardized consumer contract. Perhaps enforcing the clause redistributes away from the rich consumers (who value more highly the right to sue in court) and toward low and middle income consumers (who value a cheaper product and a cheaper process).<sup>47</sup> Or perhaps the opposite is true, because invalidating the arbitration clause preserves the right to bring class action suits, and this would benefit lower income people.<sup>48</sup> Arbitra-

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for purposes of concreteness, not to defend strong claims about the distributive or efficiency consequences at play in any of these particular scenarios.

45. See, e.g., TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 51–52, 67–69 (2007) (noting distributive effects of *restitutio ad integrum*, which provides for tailored compensation). Similarly, administrative agencies must decide whether, in cost-benefit analysis, to use a single measure of the value of a statistical life or whether to adjust the value depending on the expected income of the lives saved. See, e.g., ADLER & POSNER, *supra* note 12, at 181–82.

46. This efficiency advantage is contested and depends on a number of further assumptions. See, e.g., Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 312–16 (1994) (maintaining that setting damages equal to actual harm, rather than average harm, will improve incentives where people can anticipate actual harm levels but emphasizing that this added accuracy may not be worth its cost); Porat, *supra* note 38, at 100–05 (discussing the efficiency implications of tailored and untailored tort damage rules and rejecting the arguments for placing less value on the “lives and limbs” of lower-income people); see also Ronen Avraham, *Is Race- and Sex-Based Targeting Efficient? A Closer Look at Tort Law's Discriminatory Damage Awards* (Univ. of Tex. Sch. of Law, Law and Economics Research Paper No. E558, 2015), <http://ssrn.com/abstract=2646901> (examining the racial and gender implications of using tailored schedules to determine damage awards and contesting the efficiency argument for such targeting).

47. See Omri Ben-Shahar, *Arbitration and Access to Courts: Economic Analysis*, in REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION 447, 458–62 (Horst Eidenmüller ed., 2013).

48. The analysis here is complex. See *id.* at 462–65. While recoveries are low for class action plaintiffs, the deterrence effect might on some assumptions



tion is generally regarded as a more efficient method of dispute resolution than litigation.<sup>49</sup>

In cases such as these, the principle of tax superiority suggests the court should focus only on the efficiency implications of these decisions and ignore the distributive consequences. Where efficiency cuts in a different direction than distributive desirability (on a given social welfare function), this amounts to advice to choose a distributively inferior result.

Although K&S emphasize court-made law, the implication of the theory is by no means limited to judicial institutions. As a logical matter, their policy prescription applies just as strongly to the legislature, implying that it should also redistribute income through its tax mechanisms and no other type of law.<sup>50</sup> For example:

*Teacher Tenure.* A state legislature must decide whether to keep or discard a teacher tenure provision. Suppose the provision has the effect of increasing the number of school teachers at the high end of the ability distribution (because they value academic freedom) and at the low end of the ability distribution (because they value the ability to shirk without losing their jobs). If we assume that the teachers at the high end of the distribution primarily serve high income schools and those at the low end of the distribution primarily serve low income schools, retaining the provision will distribute toward the wealthy, while discarding it will distribute toward the poor.<sup>51</sup> The efficiency of the provision depends

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benefit consumers sufficiently to make up for the more expensive product.

49. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 340 (2007) (“Notwithstanding [previously discussed] skeptical views, the bulk of authority seems to agree that arbitration is a more efficient dispute resolution procedure than litigation.”). Eisenberg and Miller call this conventional wisdom into question, however, by finding that sophisticated parties do not typically insert arbitration clauses into their agreements with each other—something we might expect to see if arbitration clauses really did generate surplus for contracting parties. See generally *id.*

50. Indeed, the K&S analysis would specify use of only certain kinds of broad-based taxes on income or wages, not merely any policy instrument that happens to appear in the Internal Revenue Code. Using “tax expenditures” like the mortgage interest deduction, for example, introduces distortions into housing consumption choices without alleviating labor-leisure distortions—assuming the same revenues are collected by increasing burdens elsewhere.

51. Cf. *Vergara v. California*, No. BC484642, slip op. at 15 (Cal. Super. Ct.

on the aggregate effect of the provision on teacher self-selection and performance systemwide.

*Military Recruitment.* Congress must decide whether to staff the military with volunteers or conscript by lottery. Congress must also decide on military pay and benefits. Because volunteer forces are disproportionately drawn from the poor, this system of government employment tends to distribute wealth toward the poor in times of peace and away from the poor in times of war;<sup>52</sup> distribution is also affected by the level of compensation. An all-volunteer system, let us suppose, has the efficiency advantage of being cheaper to administer.<sup>53</sup>

Once again, the conventional wisdom, based on K&S, would urge that these non-tax legislative decisions be made based on their efficiency implications and not based on their distributive consequences.

The same policy advice applies to the decisions of executives and administrative agencies. Consider the following:

*Criminal Enforcement.* The mayor of a city orders the police chief to move undercover drug operations from poor to wealthy neighborhoods and target the types of drugs that are more prevalent in those neighborhoods. The district attorney shifts from a priority of pursuing prostitutes to a priority of pursuing their customers. Both measures strongly affect the distribution of the costs and benefits of criminal enforcement.<sup>54</sup> The effi-

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June 10, 2014) (striking down teacher tenure statutes as violative of the state constitution and noting that they “disproportionately affect poor and/or minority students”).

52. For discussion of the impact of army selection mechanisms on disparities in wartime casualties, see DOUGLAS L. KRINER & FRANCIS X. SHEN, *THE CASUALTY GAP: THE CAUSES AND CONSEQUENCES OF AMERICAN WARTIME INEQUALITIES* 58–67 (2010).

53. See Casey B. Mulligan & Andrei Shleifer, *Conscription as Regulation*, 7 *AM. L. & ECON. REV.* 85, 86 (2005) (“Relative to an all-volunteer army, where potential recruits show up and willingly cooperate with all procedures, conscription demands a substantial fixed cost on top of what is already being spent recruiting volunteers.”). As Mulligan and Shleifer note, the efficiency question has typically been viewed in terms of a tradeoff between better selection (through the volunteer force) and less need for distortionary taxation to fund the system (through the draft). *Id.* Their analysis seeks to understand differences among countries based on the role of conscription start-up and enforcement costs. See generally *id.*

54. See, e.g., Nirej S. Sekhon, *Redistributive Policing*, 101 *J. CRIM. L. & CRIMINOLOGY* 1171 (2012).

ciency analysis here is contested, but if the underlying prohibitions are desirable, the efficient enforcement is plausibly whichever one diminishes the crime the most cost-effectively.

*Environmental Regulation.* Proposed administrative regulations aimed at protecting the environment raise the price of electricity in a manner that disproportionately burdens poor households. Other proposed regulations raise property values near polluting power facilities in a manner that, on average, benefits poor neighborhoods.<sup>55</sup> An efficiency analysis would consider only how well these regulations internalize the costs of electricity production.

In all such cases, if the law is not tax, the advice in selecting a rule is to give no weight to distribution.<sup>56</sup>

#### B. PRESCRIPTIVE TAX SUPERIORITY'S FOUNDATION IN DISTRIBUTIVE INVARIANCE

Prescriptive tax superiority rests on a hypothesis of distributive invariance that occupies a crucial but underappreciated position within mainstream law and economics.<sup>57</sup> Specifically, the policy advice (to ignore distribution in setting legal rules) requires accepting the strong assumption that the distributive pattern in a society will be invariant to the political

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55. Whether property value increases near factories would help poor people in the area depends on whether they own their homes or rent. See ADLER & POSNER, *supra* note 12, at 143–44 (considering the possible distributive effects of an agency decision about whether to site a park in a wealthy or poor neighborhood).

56. Some law and economics scholars working in administrative law have been open to considering distributive considerations in addressing how (or if) cost-benefit analysis should be conducted. See, e.g., ADLER & POSNER, *supra* note 12, at 130–31, 142–46, 188. The distributive issue is presented bluntly in the cost-benefit context because the diminishing marginal utility of money makes the willingness to pay of the rich much greater than that of the poor. Equalizing welfare would require accounting for wealth differences. Although a tax-and-transfer system might be better in theory, its practical unavailability changes the calculus. See *id.* at 144–45. For a critique of this justification for using distributive weights in regulatory policy, see Weisbach, *Distributionally Weighted Cost-Benefit Analysis*, *supra* note 36, at 173–78.

57. K&S acknowledge this assumption to some degree, and provide qualifications based on it, as we explain below. See *infra* Part I.C. However, our review of the literature indicates that the significance of the assumption and the qualifications it implies for prescriptive tax superiority have not been widely appreciated.

form of redistribution. If the courts uphold arbitration clauses and grant entitlements against pollution to the poor and Congress replaces conscription with an all-volunteer force during peacetime, the resulting distributive changes will be offset by tax adjustments to the extent they produce divergence from the distributive pattern corresponding to the current political equilibrium. Conversely, if legal rules and policies are adopted that operate to the detriment of the poor, Congress will again adjust the tax system to restore its preferred distributive pattern. This assumption amounts to a “law of conservation” of redistribution; whatever redistribution the current political equilibrium allows is exactly the amount that will occur, no more and no less, regardless of the methods of redistribution.<sup>58</sup>

On this account, undertaking redistribution through legal rules or non-tax legislation will, at best, substitute a less efficient redistributive mechanism for redistribution that Congress would have otherwise implemented through the tax system; at worst, it will trigger a countervailing distributive move that undoes the redistribution while leaving behind the behavioral distortions. Redistributive legal rules or social policies that will inevitably either crowd out more efficient redistribution or draw costly countermoves cannot improve the distributive picture. If the amount of redistribution is fixed, then it is obvious that one should want to accomplish that redistribution in the most efficient way.

Far from being a mere detail or sideline, the invariance hypothesis is the logical linchpin of prescriptive tax superiority. Importantly, K&S, along with many law and economics scholars, maintain a position of distributive agnosticism; they do not commit themselves to any factual claims about the relationship between distribution and individual welfare (e.g., the rate at which the marginal utility of money declines). Nor do they

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58. In other words, there will be the same total amount of redistribution from a baseline in which all legal rules are wealth-maximizing. Using legal entitlements to influence distributive patterns can obviously reduce the amount of explicit redistribution that occurs, even if invariance is assumed. It is a semantic question (but not a politically unfreighted one) whether distributive choices that are “baked into” legal rules, institutional structures, and entitlement allocation choices should be regarded as “redistributive” (as opposed to just distributive) whenever they depart from those choices that would maximize wealth. For discussion of the relevance of baselines to the definition of redistribution, see *Redistribution*, STANFORD ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/redistribution> (last updated June 21, 2011); see also LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002).

commit to any particular social welfare function, but appear open to any welfarist approach, including ones that give weight to the way in which welfare is distributed.<sup>59</sup> Thus, the categorical claim of prescriptive tax superiority applies regardless of how heavily a given social welfare function weights the well-being of subsets of the population.<sup>60</sup> But universal tax superiority can logically coexist with true distributive agnosticism only if one assumes that any distributive pattern that is politically achievable at all can actually be achieved through the tax system.

To demonstrate, let us assume the opposite, distributive *variance*, such that some distributive outcome, call it Outcome *R*, can only be achieved and maintained through resort (at least in part) to redistributive legal rules. If one is truly agnostic about distribution, then one cannot exclude the possibility that Outcome *R* maximizes overall social welfare. It follows from distributive agnosticism that Outcome *R* might dominate the closest politically achievable all-tax alternative, Outcome *T*, on purely distributive grounds. But true distributive agnosticism also implies that distributive differences can be given any weight whatsoever when trading them off against efficiency losses. A welfarist might weight distributive differences heavily due to the way in which a particular social welfare function ag-

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59. See KAPLOW & SHAVELL, *supra* note 23, at 27 (“[W]e do not defend any specific way of aggregating individuals’ well-being; that is, we do not endorse any particular view about the proper distribution of well-being or income.”); *id.* at 28–31 (explaining the ways in which a welfarist approach might call for redistribution, including the possibility that “more weight might be placed on the well-being of less-well-off individuals”); see also SHAVELL, *supra* note 31, at 597 (observing that welfare economics encompasses “a vast multitude of ways of aggregating individual utilities,” including approaches in which “more equal distributions of utility may be superior to less equal distributions,” without specifying any one method). This agnosticism about distributive matters is sometimes couched in terms of lack of expertise. See, e.g., James J. Heckman, *The Intellectual Roots of the Law and Economics Movement*, 15 LAW & HIST. REV. 327, 329 (1997) (“Knight, Robbins, Samuelson, and all modern economists . . . explicitly state in their writings that they have no competence to assess the ‘appropriate’ distribution of resources and they do *not* sanction any particular distribution of resources, much less the existing one.”).

60. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF LAW* 107 (2004) (“[D]istributional equity under any measure of social welfare is better pursued through our income tax (and welfare) system than through any other social policy.”); see also Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 667 (observing that criticisms about the neglect of distributive issues in economic analysis of law “would be moot if the income tax system—understood here to include possible transfer payments to the poor—could be used freely to achieve any desired distribution of income” before discussing labor-leisure distortions that impede such free redistribution).

gregates the welfare of different people, or because of the way that wealth differences actually influence the welfare of individuals under particular social conditions.<sup>61</sup> On some imaginable social welfare function, then, combined with some set of welfare-relevant facts, the distributive gains from Outcome *R* relative to Outcome *T* would outweigh the efficiency advantages of Outcome *T* relative to Outcome *R*.

Only if the invariance hypothesis is categorically true can we rule out the possibility of welfare-maximizing outcomes that are uniquely achievable through resort to non-tax methods. Once variance in achievable distributive results is established, the fact that a particular legal rule will perform better on a given distributive metric should receive as much attention in a welfarist analysis as the fact that a particular legal rule will perform better on the efficiency metric. If a more welfare-enhancing distributive pattern is politically possible through a combination of tax and non-tax law than through tax law alone, we face the following trade-off: suffer the distortions associated with adding non-tax redistributive methods to the mix, or suffer the distributive deficits associated with forgoing those methods. Because it is not possible to know *a priori* which alternative will be less costly in welfare terms, the prescriptive claim of universal tax superiority fails.

### C. THE EXISTING LITERATURE AND THE INVARIANCE HYPOTHESIS

We will now examine how the invariance hypothesis appears in the literature, where it represents an acknowledged qualification on the prescriptive claim of tax superiority, but one whose significance has been largely neglected. Here we do not find one single, clearly stated proposition but rather a mostly unacknowledged premise revealed in scattered remarks. Moreover, there are at least two distinct ways that the invariance hypothesis might be understood, each of which finds some support in the existing literature. First, it might be understood as an assumption underpinning prescriptive tax superiority, and hence as an explicit qualification on the recommendation that the distributive effects of legal rules be ignored. Second, it might be understood as a truth-claim about the world: that our political system in fact exhibits distributive invariance. We argue that invariance is false as a factual matter. To the extent it

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61. See *supra* note 23 (discussing some of the ways that wealth differences can influence welfare).

is understood as a modeling assumption, its falsity strongly limits the real world application of tax superiority in a way that has not been generally appreciated.<sup>62</sup>

Our literature review begins with a 1979 article by Aanund Hylland and Richard Zeckhauser on why distributive goals should not influence the choice of government programs, which K&S repeatedly cite.<sup>63</sup> As Shavell says in his 1981 paper, when noting the parallel nature of the result, “the choice of a legal rule may be likened to the choice of a [government] project.”<sup>64</sup> Interesting, then, is the way that Hylland and Zeckhauser qualify their policy advice. After observing that “[r]eal life” political decisions about distribution are often made in a piecemeal fashion, contrary to their model, they explain that an unclear and partial relationship between these decisions could lead to different levels of distribution across different distributive methods and domains:

[O]ur results suggest that the group [with distributional goals] should emphasize tax strategies, but other programs should not necessarily be neglected.

....

... For example, a group which works for increased well being for the poor may achieve greater success by urging subsidies for low-income housing than by advocating cash grants to the same low-income groups. That is, the former type of support may be more acceptable to the higher-income people who will have to pay the subsidy.<sup>65</sup>

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62. An analogy can be drawn here to the way in which Robert Nozick’s ideas have been used to support arguments against redistribution. Nozick famously eschewed any “patterned” distributive goal in favor of the actual distributions produced under certain strong assumptions about the history of acquisition and transfer. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 155–60 (1974); see also *id.* at 150–53 (setting out the conditions that would, under his approach, justify the resulting entitlements). Nozick himself noted the implications of these predicate conditions failing, even if his readers often ignored this point. *Id.* at 152, 230–31 (explaining that his “principle of rectification” could call for more state intervention, potentially including approaches like the one endorsed by John Rawls). Similarly, to the extent K&S meant to present the invariance assumption as a strong qualification on their results, most law and economics scholars have either failed to receive that message or chose to ignore it.

63. Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCANDINAVIAN J. ECON. 264 (1979).

64. See Shavell, *supra* note 15, at 418.

65. Hylland & Zeckhauser, *supra* note 63, at 282.

Hylland and Zeckhauser go on to observe that the different perspectives of “goods egalitarians” and “income egalitarians” could alter the degree to which tax progressivity would respond to changes in other distributive programs.<sup>66</sup>

This theme is also found in the work of Kaplow and Shavell, although it is not presented as a formal assumption of their model. In his 1981 article, Shavell states the qualification strongly:

[I]f the income tax would not be altered on adoption of new liability rules, then in strict logic the argument given for use of efficient rules does not apply. Now, of course, no one would really expect the income tax structure to be adjusted in response to each and every change in legal rules (much less to individual changes in other domains), for this would be impractical. Therefore, one’s attitude toward the result under discussion will depend on his expectation that the income tax would be (or could be) altered in response to changes in legal rules whenever these changes resulted in a “sufficiently important” shift in the distribution of income.<sup>67</sup>

By the time of the 1994 joint article, however, K&S present the qualification in a manner that suggests an empirical conjecture:

An argument sometimes offered in favor of redistribution through legal rules is that the tax system falls short of optimal redistributive taxation—perhaps because of the balance of political power in the legislature. This argument raises questions that we do not seek to address about the function of courts in a democracy. In any case, it seems unlikely that courts can accomplish significant redistribution through the legal system without attracting the attention of legislators.<sup>68</sup>

This passage suggests that if optimally redistributive taxes are politically infeasible,<sup>69</sup> there is little prospect of welfare-

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66. *Id.* at 283.

67. Shavell, *supra* note 15, at 417.

68. Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 675.

69. The potential infeasibility of optimally redistributive taxes has often been noted. *See, e.g.*, Daniel A. Farber & Brett H. McDonnell, *Why (and How) Fairness Matters at the IP/Antitrust Interface*, 87 MINN. L. REV. 1817, 1825–26 (2003); Meurer, *supra* note 2, at 970 n.117; Scott Shapiro & Edward F.



enhancing distributive changes outside the realm of tax either. On this account, the very same congressional barriers to achieving the best distribution via tax will also impede the achievement of the best distribution through legal doctrine, because distributive changes will be offset.<sup>70</sup>

Shavell makes the point more categorically in a short book introducing the economic analysis of law.<sup>71</sup> There, he asks the question, “What if the wrong people—whoever you think they are—control the income tax system? Isn’t there, then, an argument for redistributing through law?” His answer:

Not really. Suppose, for instance, that you want the poor to have more wealth, so you make it easier for them to bring suit and collect large judgments. But if the people in control of taxes don’t want the poor to get more, presumably they can just raise taxes on the poor (or reduce credits that the poor enjoy) so as to counter the change you sought to effect.<sup>72</sup>

In a later book, however, Shavell again acknowledges that the argument for tax superiority would not apply “[i]f

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McClennen, *Law-and-Economics from a Philosophical Perspective*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *supra* note 32, at 460, 463; Sunstein, *supra* note 5, at 314–15. Indeed, there is little reason to think that Congress consciously structures the tax system to maximize welfare.

70. The passage also embeds an apparent normative suggestion that courts may be inferior institutionally to make distributive decisions. This is a separate point from one premised on invariance and indeed only becomes relevant to the extent there is variance. *See infra* Part III.B.3.

71. SHAVELL, *supra* note 60, at 108 box 17. According to its preface, the book is drawn from a law school textbook and “is a self-contained and reader-friendly introduction to the growing new subject known as economic analysis of law.” *Id.* at iii.

72. *Id.* Likewise, the teacher’s manual of the casebook coauthored by Shavell from which the book containing the quoted material was drawn includes the following:

Suppose that someone says that those in control of the political system, and thus of the income tax system, do not have the socially correct view of how much wealth should be redistributed toward the poor. Would it then make sense for [someone] to recommend taking distributional considerations . . . generally into account in policymaking, such [as] in considering whether to place ceilings on drug prices?  
Answer. Those in control of the political system will offset attempts to redistribute . . . and we will wind up hurting drug co. incentives and not helping poor.

HOWELL E. JACKSON, LOUIS KAPLOW, STEVEN SHAVELL, KIP VISCUSI & DAVID COPE, *TEACHERS’ MANUAL TO ANALYTICAL METHODS FOR LAWYERS* VI-62 (2004) (second ellipses in original).

. . . the political process is imperfect not only in failing to achieve society's redistributive goals, but also in failing to offset attempts to redistribute through the choice of legal rules."<sup>73</sup> Kaplow's separate work on distribution-neutral public policies provides further insight into his understanding of how tax offsetting operates.<sup>74</sup> In a 1996 article that focuses on the funding of public goods, a qualified empirical conjecture in favor of distributive invariance can be seen in this takeaway:

To be sure, one would not expect tax adjustments to offset the benefits of new public projects completely and precisely. Nevertheless, if one had to guess, it seems plausible that roughly, on average, and over time, changes in the level of public goods will tend to be accompanied by tax adjustments that offset changes in the distributive incidence of the benefits produced by those goods.<sup>75</sup>

More recently, in a paper addressing externality control, Kaplow queries the degree to which distribution-neutral policies could be implemented "as a practical and political matter," observing that "even a legislature that desired to offset distributive effects would be unlikely to do so with precision" where a policy generates "intricate" distributive impacts.<sup>76</sup> In an earlier footnote, however, he repeats the "conjecture" that "such reforms will, on average, tend to leave the preexisting political equilibrium regarding the extent of redistribution unaltered."<sup>77</sup>

73. SHAVELL, *supra* note 31, at 659–60.

74. See, e.g., Kaplow, *Public Goods*, *supra* note 15; Louis Kaplow, *Optimal Control of Externalities in the Presence of Income Taxation*, 53 INT'L ECON. REV. 487 (2012) [hereinafter Kaplow, *Externalities*]. These pieces are not centered on the normative claim that legal rules should not redistribute. Indeed, the 2012 Externalities piece declares itself to be "a theoretical exercise," not a basis for policy. See Kaplow, *Externalities*, *supra*, at 499, 503. Rather, these pieces show how policies that would appear to have distributive implications (and, relatedly, impacts on the magnitude of the labor-leisure distortion) can be made distribution-neutral through countervailing adjustments in the tax system, altering the way in which those policies should be evaluated in the first instance. The common thread is the claim that the tax system is well suited to make the necessary distributive adjustments to produce a desired level of redistribution, regardless of what happens in other domains. The 2000 joint K&S article thus characterized the 1996 Public Goods article as "a much more general version of the argument" from the joint 1994 paper. See Kaplow & Shavell, *Legal Rules*, *supra* note 15, at 824.

75. Kaplow, *Public Goods*, *supra* note 15, at 521.

76. Kaplow, *Externalities*, *supra* note 74, at 499.

77. *Id.* at 498 n.10.

A similar mix of claims, conjectures, and qualifications appear in other work.<sup>78</sup>

As this review reveals, some articulations of invariance assert that Congress will offset conscious efforts at distributive improvement undertaken by courts or other governmental entities, to the extent those efforts produce distributive results that deviate from congressional preferences. We might think of this as “aspirational invariance”—the claim that any effort to use legal rules to *improve* distribution (according to some metric) beyond the level indicated by the current political equilibrium will be countered by an adjustment to the tax-and-transfer system that will return distribution to its baseline condition. In the examples above, the claim would be that we should not aspire to improve distribution by selecting a new but inefficient rule regarding arbitration, tort damages, teacher tenure, military recruitment, criminal enforcement, or environmental regulation, since any apparent improvement will be undone.

But there is another facet of invariance, which we call “corrective invariance,” that must also be true in order for prescriptive tax superiority to hold. Corrective invariance refers to the claim that a legal rule or policy that *worsens* distribution (according to some metric) will not have any lasting unwanted effect on distributive results because it will be corrected through tax-and-transfer.<sup>79</sup> Suppose, to maximize wealth, we would

78. See, e.g., KAPLOW & SHAVELL, *supra* note 23, at 35 n.39 (rehearsing invariance arguments and concluding that “it seems unlikely that judges could succeed in implementing a regime that was significantly more or less redistributive than the one favored by the legislature”); Louis Kaplow, *Discounting Dollars, Discounting Lives: Intergenerational Distributive Justice and Efficiency*, 74 U. CHI. L. REV. 79, 97 (2007) (observing, in the intergenerational context, that “if one had to predict a priori the most likely long-run distributive impact of a policy change, distribution neutrality would be the best guess” but stressing that this “is merely a conjecture of what may tend to be true roughly, on average, and in the long run, not a precise description of any particular political reality”); Louis Kaplow, *On the (Ir)Relevance of Distribution and Labor Supply Distortion to Government Policy*, 18 J. ECON. PERSP. 159, 172–73 (2004) (observing that “[i]f one had to speculate about how redistribution would ultimately tend to be affected by government projects, it seems plausible to suppose, as a first approximation, that the long-run political equilibrium regarding redistribution will not be affected in an obvious, predictable manner by this or that government action,” making distributive neutrality a useful construct, even though “the political process is far more complicated than this”); see also Yew-Kwang Ng, *Quasi-Pareto Social Improvements*, 74 AM. ECON. REV. 1033, 1040 (1984) (positing that “[e]specially in the long run, the forces that operate to prevent redistribution through taxation will also operate to prevent redistribution by other means” but noting that “actual political decisions are affected by a host of factors”).

79. The notion of corrective invariance encompasses not just instances in

need to adopt a new legal rule regarding arbitration, tort damages, teacher tenure, or some other topic, and this rule will adversely affect distribution. Corrective invariance counsels us to ignore this distributive deficit and adopt the rule because Congress can and will offset the loss through a change in tax-and-transfer. In sum, aspirational invariance holds that it is impossible for courts or policymakers to make the distribution better, while corrective invariance holds that it is impossible for them to make the distribution worse.<sup>80</sup>

These are the claims we reject. Of course, K&S do not assert that invariance (of either form) is true in an absolute sense as an empirical matter. But however one might understand their position(s) on the matter, the implications for tax superiority have not been generally appreciated. With a few exceptions,<sup>81</sup> the received wisdom seems to accept prescriptive tax superiority without confronting or even raising the issue of invariance.<sup>82</sup> Our goal here is to bring invariance to a position of prominence equal to that held by the zero transaction cost assumption. As we establish below, invariance is equally false, and in ways that are just as policy-relevant.

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which courts or policymakers enact new rules or laws that affirmatively worsen distribution, but also *inaction* by governmental entities when economic or social conditions produce distributive deficits that they would be in a position to address. Tax superiority would assert that these deficits can always be addressed more cheaply through tax-and-transfer—assuming the political equilibrium allows them to be addressed at all. This last point connects to the possibility that changing distributions alter the political equilibrium and change what it is possible to achieve distributively. *See infra* notes 177–79, 186 and accompanying text.

80. We are not aware of anyone previously drawing a clear distinction between these two facets of invariance. A focus on the aspirational flavor of invariance understates the impact of the distributive message associated with the principle of tax superiority. It is not just a matter of recommending that courts and policymakers leave distributive *improvements* to the tax system; tax superiority also prescribes choosing efficient legal rules and policies that will make distribution *worse*, based on the assumption that there will be an appropriate correction through tax.

81. The most extended discussion of which we are aware is found in Markovits, *supra* note 5. Matthew Adler and Eric Posner also appear to expressly recognize the possibility of variance when they observe (in a discussion of whether and how cost-benefit analysis should account for wealth distortions) that “it might be the case that welfare-improving transfers through the tax and welfare system are not made because Congress has other things on its mind, and not because the optimal distribution of wealth has been achieved.” ADLER & POSNER, *supra* note 12, at 144–45.

82. Our research suggests that references to K&S’s views favoring tax-and-transfer almost never mention the point. The political infeasibility of optimally redistributive taxes is a not uncommon critique, but scholars do not often address K&S’s invariance response to that critique.

## II. THE INVARIANCE HYPOTHESIS IS FALSE

So far, we have established that the claim of prescriptive tax superiority depends on an assumption of distributive invariance. That assumption implies that the political action costs for tax adjustments are equal to or less than the political action costs of any alternative method of distributing the same quantum of income. In this Part, we proceed to explain why the invariance hypothesis and the associated implication about political action costs are false. We do not mean false in some trivial sense, but seriously, substantially wrong. (We also argue in Part II.B.4 that even if there were only a trivial amount of variance, it would still upend the policy advice of tax superiority).

## A. FROM EMPIRICS TO THEORY

The claim of invariance requires a system of tax and transfer that is impressively responsive—capable of adjusting, and motivated to adjust, when legal rules alter the distributive balance. How well does this image of distributive responsiveness square with observed behavior? Consider first the fact that the tax-and-transfer system has not generally adjusted over time to correct for changes in the national income distribution. For example, the ratio of the top disposable income quintile to the bottom disposable income quintile (i.e., the share of all post-tax-and-transfer income received by the top 20% divided by the share of the bottom 20%) has changed from 5.7 in 1974 to 8.2 in 2012, a 44% increase.<sup>83</sup> The (post-tax-and-transfer) Gini coefficient, an overall measure of income inequality,<sup>84</sup> has gone from 0.316 in 1974 to 0.389 in 2012, a 23% increase, similar to the

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83. The statistics in this paragraph are drawn from *Income Distribution and Poverty: By Country*, ORG. ECON. COOPERATION & DEV., OECD. STAT., <http://stats.oecd.org/Index.aspx> (last visited Nov. 24, 2015). To view these and other measures of income inequality on the OECD site, select the “social protection and well-being” hyperlink on the left-hand side bar; then select the “income distribution and poverty” hyperlink; finally select the “by country-INEQUALITY” hyperlink. The interface can then be used to select countries, inequality measures, and date ranges to map changes over time.

84. See *supra* note 83. The Gini coefficient measures the amount of income inequality in a society by plotting a curve that depicts the share of income earned by each income percentile (the Lorenz Curve) and then generating a ratio that reflects the degree to which that curve diverges from a perfectly proportionate income dispersion. See, e.g., LEE S. FRIEDMAN, *THE MICROECONOMICS OF PUBLIC POLICY ANALYSIS* 126–28, fig. 5-1 (2002). Zero would represent perfect equality and one would represent perfect inequality (where one person receives 100% of national income).

contemporary difference between Canada (0.316 in 2011) and Russia (0.396 in 2010).<sup>85</sup>

It is of course possible that Congress responds nimbly through tax policy to distributive changes that emanate from legal rules while letting stand distributive changes that emanate from other sources. But it is difficult to imagine the set of institutional features that would produce such a pattern.<sup>86</sup> Consider, for example, the fact that most voters have little idea of the true distributive picture.<sup>87</sup> Such lack of awareness seems more consistent with generalized nonresponsiveness to distrib-

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85. See *supra* note 83. Another way to frame the empirical issue is to note that the wide variation in pre-tax income over the century has not been matched by corresponding fluctuations in tax rates. Compare Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Updated with 2014 Preliminary Estimates)* 4 (June 25, 2015), <http://eml.berkeley.edu/~saez/saez-USStopincomes-2014.pdf> (“[T]he top percentile has gone through enormous fluctuations along the course of the twentieth century, from about 18 percent before WWI, to a peak to almost 24 percent in the late 1920s, to only about 9 percent during the 1960s–1970s, and back to almost 23.5 percent by 2007.”), with H. PEYTON YOUNG, *EQUITY IN THEORY AND PRACTICE* 114 (1995) (indicating, at table 6.2, remarkable stability in effective income tax rates over time).

86. One theory might be that Congress has few fixed preferences about distribution as such, but fastidiously undoes distributive *legal rules* to maintain its own dominance among governmental actors in setting distributive policy. But there is no evidence of this. Another possibility might be that other sources of distributive change generally move in tandem with Congress’s own distributive preferences or actually change Congress’s own distributive preferences, whereas legal rules are not thought to do so. But this argument is non-falsifiable and cannot on its own be used to support a conjecture that is at odds with the weight of available evidence. See *infra* Parts III.A.1 and B.1 (discussing issues of tautology and burden of proof).

87. See, e.g., John R. Chambers, Lawton K. Swan & Martin Heesacker, *Better off than We Know: Distorted Perceptions of Incomes and Income Inequality in America*, 25 *PSYCH. SCI.* 613 (2014) (finding that Americans underestimate average incomes, overestimate the current income gap between top and bottom quintiles, and overestimate the rise of this measure of inequality over time); Michael I. Norton & Dan Ariely, *Building a Better America—One Wealth Quintile at a Time*, 6 *PERSP. PSYCH. SCI.* 9 (2011) (finding in a nationally representative online panel that people perceived wealth distribution as far more equal than it actually is, and that they desired wealth distributions that were even more equitable than these erroneous estimates); Vladimir Gimpelson & Daniel Treisman, *Misperceiving Inequality* (Nat’l Bureau Econ. Research, Working Paper No. 21174, 2015), <http://www.nber.org/papers/w21174> (using large-scale cross-national surveys to show that individuals know little about economic inequality in their nation); see also Sorapop Kiatponsan & Michael Norton, *How Much (More) Should CEOs Make? A Universal Desire for More Equal Pay*, 9 *PERSP. PSYCH. SCI.* 587 (2014) (using survey data from forty countries to trace misperceptions about CEO pay versus average worker pay, and finding divergence among actual, perceived, and “ideal pay” for CEOs).

utive shocks than with selective political responses based on the source of the distributive change. In the absence of any evidence that Congress is consistently offsetting redistributive legal rules in the real world, we take its real world nonresponsiveness as strong circumstantial evidence against distributive invariance.

Further evidence of distributive invariance is provided by another readily observable fact: individuals and groups continually incur considerable political costs to win distributive fights over legal rules and non-tax policy. Consistent with public choice theory, individuals and groups fight to get a larger share of societal wealth. We think this point is beyond question, but here are some examples. Trade associations and public interest groups support litigation to influence distributive outcomes, such as whether public school teachers must have tenure or whether greater punishments for crack than powder cocaine trafficking are constitutional.<sup>88</sup> Congress cannot close unneeded military bases without employing special procedures (pre-commitment to an up or down vote on the recommendation of a base closing commission) because representatives of the localities where bases are located fight so hard to preserve the distribution of wealth that base-related jobs create.<sup>89</sup> Legislators and lobby groups fight over free trade agreements because, whatever the net effects, some individuals and localities will lose from foreign competition and the losers do not expect to be fully compensated by the winners.<sup>90</sup>

None of these expensive and long-lasting distributional battles make much sense if the tax-and-transfer system will reliably undo all of them. Given distributional invariance, people would fight only over competing views about the efficiency of legal rules and non-tax policies (because economic growth would make their fixed distributional slice worth more). Political winners and losers would not otherwise expect, respectively, to gain or lose income, except in the very short run before the

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88. See *supra* note 51 and accompanying text (discussing tenure example); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303–06 (1995) (discussing failed equal protection clause challenges to the racial disparity created by the punishment differentials for crack and powder cocaine). In 2010, Congress enacted the Fair Sentencing Act, Public Law 111-220, to reduce the crack-powder punishment disparity.

89. See, e.g., Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. COLO. L. REV. 331 (1991).

90. See, e.g., William H. Kaempfer, Edward Tower & Thomas D. Willett, *Trade Protectionism*, in 2 THE ENCYCLOPEDIA OF PUBLIC CHOICE 550–76 (Charles K. Rowley & Friedrich Schneider eds., 2004).

congressional offset occurred. Short run distributional stakes would usually be too low to justify large expenditures to affect the outcome. But all of these points describe another world, not our reality. The simplest explanation for pervasive distributional battles is that everyone knows they can affect distribution in the long run.

But *why* would they expect such variance? To bolster these empirical observations, we offer some theory. The rest of this Part seeks to explain why there is not a single distributive equilibrium, i.e., why political action costs vary with the form that redistribution takes. To begin, even the simple assumption that action is costlier than inaction produces enough variance to make implausible the idea that distributive results would remain unchanged no matter how we set up legal rules and institutions.<sup>91</sup> Other reasons include the fact that distributive efforts are carried out at multiple levels of a federal system, that psychological phenomena like framing and salience influence political acceptability, and that fairness preferences play a role in producing political results.

For all these reasons, we would expect to see variation in political action costs, which we define broadly to capture all of the impediments parties encounter in achieving desired distributive outcomes through legal coercion, whether through legislation, litigation, or regulation. While a full explication of the types and determinants of political action costs lies beyond the scope of the present project, it is helpful to briefly classify them in a chronological manner similar to the taxonomy that Carl Dahlman used (and Coase later embraced) for transaction costs.<sup>92</sup> In Dahlman's schema, there are "search and information costs," "bargaining and decision costs," and "policing and enforcement costs."<sup>93</sup>

Parallels can be found in the context of political action. Proponents of a distributive change must initially identify opportunities to carry out shifts in the desired direction, whether those shifts involve new changes or offsets of undesired chang-

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91. See, e.g., Barak Orbach, *A State of Inaction: Regulatory Preferences, Rent, and Income Inequality*, 16 THEORETICAL INQUIRIES L. 45 (2015).

92. See COASE, *supra* note 2, at 6 (quoting Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979)).

93. Dahlman, *supra* note 92 (internal quotation marks omitted); see also Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611, 614–16 (1989) (noting temporal organization of this taxonomy and proposing a functional alternative).



es.<sup>94</sup> After this *search or opportunity-spotting* phase is complete, costs must be incurred to bring the proposed distributive change to the attention of a relevant decisionmaking body and convince the decisionmaker to undertake it.<sup>95</sup> These costs include coordinating collective action, framing the proposal, lobbying or litigating for it, and so on. This might be understood as a *decision influencing* stage designed to bring the party in power to the point of deciding to carry out the distributive change. Finally, there is an *execution, enforcement, and maintenance* phase that consists of actually undertaking the costs to effect the distributive shift and ensuring that the efforts are not sidelined or undone by others.<sup>96</sup> With these three broad phases in mind, we turn to some of the mechanisms that could cause these costs to be higher or lower depending on the distributive avenue elected.

#### B. OFFSETS AND INERTIA

The invariance hypothesis is premised on the ability of Congress to offset distributive changes occurring elsewhere in the system (whether to correct maldistributions unintentionally generated by other actors, or to beat back aspirational efforts to change distribution in ways that clash with congressional preferences). Taken literally, the hypothesis assumes that it is no more costly for Congress to restore its preferred distributive pattern after a disruption to it than it is to maintain it in the absence of that disruption. A focus on political action costs suggests several reasons why restoration might be more costly than mere continuation of the preexisting distributive pattern.

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94. This requires, among other things, identifying an institution capable of producing the desired shift. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 7 (1990) (“Institutions, together with the standard constraints of economic theory, determine the opportunities in a society.”). For this reason and others, analysis of institutions and institutional change connects tightly to political action costs.

95. Capturing the necessary attention may be the most difficult hurdle in many instances. See FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 68–89 (2009).

96. Thus, the political action costs of realizing a desired distributive pattern depend in part on how costly it is for a body with contrary preferences to counteract the change. If countermands are costless, the political action costs of achieving change through the selected body are infinite. This category of executing, enforcing, and maintaining also overlaps to some degree with administrative costs that have been discussed in prior analyses. See *supra* note 31. Although a welfarist analysis would count *all* costs, our interest in this paper is in drawing attention to the previously neglected costs of overcoming impediments that are political rather than administrative in nature.

First, there are search and information costs in noticing that there is a distributive change to counteract and assessing what it would take to counteract it. Second, there may be costs that fall into the decision-influencing stage, to the extent that the very existence of the target distributive action has altered the political equilibrium—whether by creating entrenched, concentrated interests who are now invested in not losing what they have gained, demonstrating the wisdom of the distributive change in question, or otherwise.<sup>97</sup> Third, there are costs in simply implementing and executing the offsetting action.

### 1. Imprecise and Incomplete Offsetting

Kaplow and Shavell separately acknowledge that offsetting is likely to be less than absolute. Shavell says “no one would really expect the income tax structure to be adjusted in response to each and every change in legal rules.”<sup>98</sup> Kaplow states: “one would not expect tax adjustments to offset the benefits of new public projects completely and precisely.”<sup>99</sup> Thus, for example, if Congress funds the creation of dams for flood control or places military bases in economically depressed areas and thereby redistributes to the poor, we would not expect Congress to “completely and precisely” offset that form of non-tax redistribution with an adjustment to taxes that recoups that benefit from the poor.

Both imprecision and incompleteness in offsetting deserve attention. Offsetting is *imprecise* to the extent that it does not restore all individuals to their pre-change distributive status. Suppose we assume that Congress will use a broad-based tax instrument keyed to income to offset the distributive effects of a legal rule that affects only a subset of the population in ways that correlate only roughly with income. As a result, offsetting will necessarily be haphazard and imprecise. Distributive invariance, accomplished in this manner, can at most mean something like preserving a society-wide Gini coefficient or ensuring that members of particular income deciles or quartiles fare equally well or poorly, on average. Depending on the par-

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97. See, e.g., Markovits, *supra* note 5, at 599–601; cf. Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 326 (2014) (observing that the passage of a law provides information and resolves uncertainty because “[a]fter the law has been passed, policy makers can observe the new state of the world and determine the law’s effects”).

98. Shavell, *supra* note 15, at 417.

99. Kaplow, *Public Goods*, *supra* note 15, at 521.

particular social welfare function in use, however, this may or may not count as an equivalent distributive result.

*Incomplete* offsetting means that some non-tax distributive changes will stick. This means it is possible to increase, to some unspecified degree, the amount of redistribution by adding non-tax mechanisms to the tax mechanism. It also means that unwanted distributive changes that might accompany the adoption of efficient legal rules will go uncorrected to at least some extent. If we should expect imprecise and incomplete offsetting of the distributive effects of the legislature's own handiwork, we would expect offsetting to be even less precise and complete when another governmental body (e.g., the courts or administrative agencies, or any of the fifty states or the tens of thousands of local jurisdictions) does the redistribution. Congress would presumably be less aware of, and feel less electoral accountability for the redistribution carried out by other governmental bodies.

## 2. Legislative Inertia

The qualifications above dovetail with the well discussed ideas of legislative inertia and entrenchment. A standard observation is that it is easier to maintain the status quo than to change it.<sup>100</sup> Congressional bicameralism and the committee system, not to mention the Senatorial filibuster, create multiple legislative veto points, and parliamentary procedure allows party leaders to set the agenda, all of which makes it possible to defeat legislation that is supported by the median voter.<sup>101</sup> Because there are political costs to enacting legislative changes

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100. For an extended analysis of the reasons the status quo is so difficult to change, see generally BAUMGARTNER ET AL., *supra* note 95. Baumgartner and his coauthors identify the division of power in the political system and limited attention as primary reasons for the stickiness of the status quo. *See id.* at 43–44, 88.

101. Significant strands of political science and economics claim that legislative policy responds to the demands of the median voter. *See, e.g.*, ROBERT S. ERIKSON, MICHAEL B. MACKUEN & JAMES A. STIMSON, *THE MACRO POLITY* (2002); Roger D. Congleton, *The Median Voter Model*, in 2 *THE ENCYCLOPEDIA OF PUBLIC CHOICE*, *supra* note 90, at 707; Dennis C. Mueller, *Majority Rule—Positive Properties*, in *PUBLIC CHOICE II* 58 (1989). But significant scholarship also identifies the ways that legislative structure produces results contrary to the median voter theory. *See, e.g.*, Keith Krehbiel, *Legislative Organization*, 18 *J. ECON. PERSP.* 113 (2004); McNollgast (Matthew McCubbins, Roger Noll & Barry Weingast), *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 *LAW & CONTEMP. PROBS.* 3, 16–19 (1994) (describing the role of “veto gates” and agenda setting in generating legislation and the limits it places on majoritarian decisionmaking).

to the status quo, existing law can diverge to some degree from legislative preferences (however that is understood, such as the preferences of the median legislator).

Consider statutory interpretation. Courts have some latitude in interpreting statutes because the legislature will not overturn every decision that diverges even slightly from its preferred outcome. The literature on strategic judging posits that judges seek to indulge their policy preferences to the maximum degree possible without overstepping the bounds of legislative inertia.<sup>102</sup> The complexities of political organizing to overcome collective action problems in the formation of winning coalitions mean that tactical victories can lead to strategic victories.<sup>103</sup> Distributive invariance would require a political process that is far more simple and deterministic than the one we appear to have.

The inertia we see in legislative action logically extends to the issue of distribution. However, there are some differences in the tax-and-transfer realm. Perhaps most significantly, getting taxes on the agenda and implementing changes to them is trivial; there is major tax reform every few years as well as annual technical changes, such as adjusting the alternative minimum tax.<sup>104</sup> Search and information costs—here, knowing

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102. See, e.g., Pablo T. Spiller & Emerson H. Tiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 503 (1996) (“[R]ecent positive political analyses of Supreme Court decision making . . . emphasized that the Court makes its [statutory] decisions in a way that insulates them from legislative override. The Court, for example, may make a decision that takes advantage of the legislative decision-making process (such as bicameralism . . . or the committee system), which can insure against a legislative override.” (footnote omitted)); see also John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992); Alicia Uribe, James F. Spriggs II & Thomas G. Hansford, *The Influence of Congressional Preferences of Legislative Overrides of Supreme Court Decisions*, 48 LAW & SOC'Y REV. 921 (2014).

103. These complexities help to solve a puzzle that our rejection of distributive invariance presents: why the forces contending over distribution would not deploy their resources in such a manner as to equalize resistance to unwanted changes in each arena, rather than effectively overinvesting in resistance in some arenas relative to others. An answer may be found in the varying nature of collective action necessary to pursue or resist certain distributive goals in different contexts. If, for example, stopping redistribution through legal rules allows more free-riding by parties affected by the new rule than stopping redistribution through tax-and-transfer, more investments may be made in the latter than the former. Cf. Dhammika Dharmapala, *The Congressional Budget Process, Aggregate Spending, and Statutory Budget Rules*, 90 J. PUB. ECON. 119 (2006).

104. See Weisbach, *Distributionally Weighted Cost-Benefit Analysis*, *supra* note 36, at 174 (citing estimates of 15,000 tax code changes since 1986).

what distributive changes have occurred that might require offsetting—might also be streamlined through aggregate data about distribution.<sup>105</sup> Yet the fact that Congress routinely makes technical changes to the tax code and has access to useful data compilations does not mean that it revisits fundamental distributive policy regularly, much less that it persistently returns distribution to some single set point. We suspect that distribution is subject to political cycling and that some method of entrenchment of any given result is necessary to terminate cycling through all distributive possibilities.<sup>106</sup> Once an outcome is in place, interest groups will exploit legislative veto points to block legislative readjustments.<sup>107</sup> As a result, we would not expect to see redistributive legal rules consistently counteracted, either *à la carte* or *en masse*.<sup>108</sup>

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105. See *id.* at 174–75. But see Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 675 (observing that it may remain important to trace distributive effects of legal rules “because those formulating income tax policy need to be aware of any significant distributive effects of legal rules that would not otherwise be apparent, such as from studying information on the actual distribution of income”).

106. See, e.g., ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 677–85 (2d ed. 2002) (explaining how the process of legislation works to make change difficult); Nicholas R. Miller, *Majority Rule and Minority Interests*, in POLITICAL ORDER: NOMOS XXXVIII 207, 241 (Ian Shapiro and Russell Hardin eds., 1993) (explaining why, in “distributive politics, majority rule is chaotic and cannot be blamed or credited for any particular outcome”); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1814–16 (2003) (identifying reasons that the structure and process of legislation works to entrench existing legislation).

107. See Francis Fukuyama, *Oh for a Democratic Dictatorship and Not a Vetocracy*, FIN. TIMES (Nov. 22, 2011, 5:27 PM), <http://www.ft.com/cms/s/0/d82776c6-14fd-11e1-a2a6-00144feabdc0.html#axzz1zg7rjoNs> (describing the contemporary American form of government as a “vetocracy”). Put differently, the asymmetry between the political action costs of preserving the status quo and changing it produces path dependence in distributive legislation. See Bradley A. Hansen & Mary Eschelbach Hansen, *The Role of Path Dependence in the Development of US Bankruptcy Law, 1880–1938*, 3 J. INST’L ECON. 203 (2007); Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001). See generally Scott E. Page, *Path Dependence*, 1 Q.J. POL. SCI. 87 (2006) (reviewing the use of path dependence in political science theory).

108. See, for example, Markovits, *supra* note 5, at 600, for some reasons why such countering might not occur, including “the fact that legislators may have to incur special costs to pass legislation that in effect reverses judicial decisions, changes the jurisdiction of the courts, controls who is appointed to the courts, or packs the courts.” Markovits goes on to observe that the judicial decision may itself “deter legislative efforts to offset the redistributions the court effectuated by changing the information, distributional values, or awareness of the concrete implications of given distributional values of the

Here we note one interesting source of distributive entrenchment that we think features in a lot of tax and non-tax distribution: coalition-building through leakage. As we noted above, another standard (but merely contingent) reason to oppose redistribution through non-tax law is that it will be poorly targeted, causing a form of redistributive leakage. If we assume that redistribution is appropriately targeted at those who have lower incomes, then a tax rule that is based on a precise measurement of incomes will select suitable recipients more accurately than will a legal rule that depends on a proxy for income or wealth.<sup>109</sup> Such a legal rule will sometimes redistribute away from, rather than toward, the intended targets.

Yet this apparent defect of leakage could be a feature rather than a bug for those seeking redistribution, depending on how it changes the costs of political action. Those who benefit from leakage are induced to prefer the redistributive scheme that produces it. This is why universalist welfare programs enjoy greater political stability than targeted programs and may accomplish more redistribution to the poor despite not being limited to that purpose.<sup>110</sup> Similarly, a judicial decision aimed at benefiting the mostly poor neighbors of a polluting factory might be less prone to being undone legislatively if it also incidentally benefitted a few wealthy neighbors with political clout.<sup>111</sup> If the political assistance of the wealthy neighbors is

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members of the legislature in question and/or their constituents,” or otherwise alerting the legislature to how much a particular distributive change is valued. *Id.* at 600–01.

109. Income is not, of course, the only possible metric for redistribution. Income is often viewed as a mere proxy for the real variable of interest, ability. Moreover, there are many ways that people can become less well off that might be more appropriately measured through metrics other than income. For example, they might be less healthy or less happy. Without endorsing income as the best possible target for all redistributive efforts, we will assume for purposes of the present discussion that it is the relevant variable, and that legal rules are likely to be less good than tax rules at identifying recipients. See Logue & Avraham, *supra* note 32, at 207–52. If some other metric of well-being measured who should be the target of redistributive efforts, legal rules might do a better job of targeting in some cases. See, e.g., *id.*; Sanchirico, *supra* note 26.

110. See, e.g., Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313 (2011).

111. The example in the text assumes that a very precise legislative countermand would be sought—one that would turn all of the previous winners into losers and vice versa. This is where leakage would have political traction. If the offsetting were cruder so that it only lowered the position of low-income people in general, and did not reduce the position of those well-off people who fortuitously happened to win out through “leaky” legal rules, then the political

pivotal—the legislature overrules the court if and only if the sole beneficiaries are the poor—then leakage produces more redistribution than no leakage. Whatever one may think of this normatively, the possibility that it could happen (without being legislatively undone) undermines the invariance hypothesis.

### 3. Offsetting and Inertia in a Federal System

There are additional reasons to doubt that distributive changes will be counterbalanced to produce an invariant distributive outcome. First is the fact that there are fifty states and tens of thousands of local governments that are involved in making distributive choices,<sup>112</sup> both through taxation choices and the development of legal rules and policies that affect distribution.<sup>113</sup> The conventional wisdom is that all redistribution should occur at centralized levels to avoid the problem of a tax base with feet.<sup>114</sup> If people can simply move to avoid being on the losing end of redistribution, local redistributive efforts will accomplish nothing more than introducing costly distortions in locational decisions. Nonetheless, states and localities often undertake efforts that have redistributive aims,<sup>115</sup> and at least some of these efforts are likely to redistribute in the contemplated direction to some extent. How do these real-world efforts fit into the invariance hypothesis?

Suppose that the Texas Supreme Court adopts a new approach to eminent domain compensation under the state constitution that effectively increases the compensation provided to

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advantage indicated in the text would not hold. However, in that case invariance would be independently undermined by the lack of precision in the countermand. Similar analysis would apply if the factory owner seeks offsetting advantages through other channels—ones that do not directly and precisely burden the parties who benefited from the legal rule.

112. As of 2012, there were 38,910 general-purpose local governments (which includes counties, municipalities, and towns or townships). See LYNN A. BAKER ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 53 (5th ed. 2015) (citing U.S. Census Bureau data). While local governments exhibit heterogeneity in terms of their powers to tax and to enact overtly redistributive policies, virtually all local governments hold the power to make choices that will have distributive implications.

113. See Brian Galle, *Is Local Consumer Protection Law a Better Redistributive Mechanism than the Tax System?*, 65 N.Y.U. ANN. SURV. AM. L. 525, 530–40 (2010).

114. See, e.g., Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1058 (2007) (referencing the “conventional wisdom that localities should play little role in fulfilling the redistributive functions of government”).

115. See *id.*

low-income displaced households.<sup>116</sup> Texas does not have an income tax and therefore cannot make adjustments to it to counteract this change. Nor does it seem plausible that Congress would respond to this legal change in Texas by altering the structure of the federal income tax. It could alter the progressivity of the income tax generally, or adjust the Earned Income Tax Credit (EITC) program, in order to produce a change that would bring the average distributive results back to a baseline, but only by affecting many people outside Texas, and many within Texas who did not suffer condemnations.<sup>117</sup> A more targeted response would be possible, though it seems even less plausible. For example, Congress could treat amounts of compensation received through the Texas program as offsets against any amounts the household would receive through the EITC.

An empirical question is whether we actually observe such efforts to directly counteract distributive changes made at a lower level of government. One indication that we do not is found in recent work by Eric Kades that advocates for a new federal tax adjustment to offset the increasing regressivity of state and local taxes.<sup>118</sup> If federal tax policy does not already routinely counteract the regressivity of state and local tax policy, it seems even more far-fetched to imagine it will undo the distributive effects of substantive law developed by state courts or enacted by state or local legislative bodies.

Does the absence of jurisdictional offsetting disprove the invariance hypothesis?<sup>119</sup> Invariance proponents might argue

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116. Although this example involves a state, it could just as easily be an example involving a locality. For example, the City of Chicago might enact a housing policy that operates to the benefit of lower-income residents.

117. Note that such an offset would only produce results that count as distributively equivalent under a social welfare function that is indifferent to whether people in, say, the entire bottom decile are benefited a little, or whether instead a small subset of geographically clustered people falling in that decile are benefited a lot.

118. See Eric Kades, *Corrective Progressivity* (2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621356](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621356). Although each state has, in aggregate, a regressive tax system, there is great variance among the states in the degree of regressivity. See *id.* at 16–21. Offsetting would therefore require state-specific federal tax adjustments, as Kades advocates. See *id.* at 21–41 (detailing how the corrective progressivity approach would work).

119. Importantly, our focus here is on targeted responses that would directly counter specific redistributive efforts. These kinds of countermands could not be informed by aggregate data in the manner suggested by Weisbach, *Distributionally Weighted Cost-Benefit Analysis*, *supra* note 36, at 174–75. Broader countermands directed at the income distribution generally, nationwide,



that state and local distributive changes are not commonly undone because they contribute to the maximization of (what has just then become) society's current social welfare function. This is a subspecies of a tautological theory we will have more to say about below.<sup>120</sup> It suffices for now to observe that this argument would require us to make the highly unrealistic assumption that Congress is constantly evaluating the distributive incidence of all the policies (not just the tax policies) of tens of thousands of subnational jurisdictions in order to determine which tax changes to implement—and refrain from implementing—federally.<sup>121</sup>

#### 4. A Note About Magnitude

Perhaps readers accept that the invariance hypothesis is technically false, but conjecture that the magnitude of variance is sufficiently small that the doctrine of tax superiority survives intact. Have K&S gotten things right to a first approximation, so that we are quibbling over the distributive equivalent of rounding errors? We do not think so. The discussion above provides ample support for the idea that distribution must diverge from Congress's ideal point by some nontrivial amount before any corrective action will be taken.<sup>122</sup> Changes short of this triggering amount fall within what we might call a Margin of Inaction (MOI). The sections below discuss some factors that can make corrective or countervailing congressional action

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are possible but would not likely produce meaningful distributive equivalence, as noted above. *See supra* note 117.

120. *See infra* Part III.A.1.

121. An alternative claim might be that the social welfare function is set independently by each state and locality, so that whatever we actually observe at the state or local level represents the invariant local distributive result for that particular place at that particular time. This claim does not mesh well with tax superiority, however, both because it cuts against the usual preference for centralized redistribution and because states and localities do not always even possess traditional tax and transfer tools. Even where tax-and-transfer tools are available to states or localities, they may involve higher procedural hurdles (such as supermajority rules) or produce greater distortions, making it implausible that the same distributive outcome would result locally regardless of the route selected. *See, e.g.,* Galle, *supra* note 113 (positing that local redistributive efforts undertaken through non-tax means are less likely to suffer from the distortionary effects that local taxation is generally thought to occasion).

122. The idea that attention is a scarce and crucial input to legislative change is consistent with a model in which effects can accumulate unaddressed for quite some time before triggering a response. *See* BAUMGARTNER ET AL., *supra* note 95, at 43–44.

slower to come, causing the MOI to grow. It is likely, therefore, that the MOI is large, at least in some contexts.

Even a fixed and small MOI is devastating to the categorical claim of tax superiority, however. This is clear when we consider again the stance of distributive agnosticism taken by K&S and other legal economists. As long as legal rules can produce some durable distributive variance, that variance will be enough on some imaginable social welfare function to make a difference to welfare. This is enough to make the choice of distributive mechanism indeterminate.

Moreover, tax superiority has traction as a normative prescription only as contrasted with some other actually available means of redistribution. Thus, the crucial variable is not the absolute size of the MOI, but its size *relative to* the power courts and other governmental actors have to advance welfare through their distributive choices. Suppose, for example, that courts or executives adopt inefficient rules only when: (1) the inefficiency is small; (2) they have good evidence that the rule will actually affect distribution in a welfare-enhancing direction (after accounting for haphazardness and contracting-around);<sup>123</sup> and (3) doing so otherwise fits within the zone of discretion that they have been afforded within their institutional roles. If these worthwhile distributive opportunities are sufficiently scarce and limited in scope, the entire set of them may fall within even a relatively small MOI—meaning that if courts take *every* worthwhile opportunity to redistribute, they cannot cumulatively change distribution enough to trigger a congressional reaction.<sup>124</sup>

We need not assume that the MOI is fixed, of course. We might expect it to vary depending on a variety of factors that influence the salience and political valence of different distributive shifts. For example, there might be a different trigger point for corrective offsetting than for aspirational offsetting. Thus, even if we posit that Congress will be relatively quick to counteract efforts to overtly improve distribution through non-tax

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123. Although usually presented as complements to the K&S distortion argument, the contracting-around and haphazardness objections narrow the set of available distributive opportunities that might be exploited through legal rules. They therefore make it more likely that the remaining opportunities will fall within the operative MOI.

124. It is possible, of course, that redistributive opportunities exceed the MOI. While this complicates the advice that welfarists might receive, as we discuss below, it does not alter the basic point that a positive MOI disproves invariance and with it the categorical claim of tax superiority. *See infra* notes 187–91 and accompanying text.

means, it does not follow that it will be equally quick to correct the unintended distributive consequences of newly adopted efficient legal rules, much less that it will nimbly keep up with societal changes or rent-seeking opportunities that worsen distribution relative to its ideal point.<sup>125</sup> The possibility that Congress will lag in its corrective role widens the space within which a court or other actor could effect distributive improvements.

The following sections discuss a number of other reasons that offsetting behavior might vary depending on the source and characteristics of the distributive change. Although the questions are empirical ones, there is no reason to assume that the MOI is so small across all contexts as to make invariance a serviceable foundation for tax superiority.

### C. FRAMING, SALIENCE, AND COGNITIVE BIASES

In recent years, large literatures have investigated how human cognitive features may systematically alter the perception of, and hence the response to, a variety of policies and legal rules. One line of analysis, which we will not revisit here, is whether the labor-leisure distortion thought to be common to all redistributive efforts is actually attenuated in some contexts by cognitive features like optimism.<sup>126</sup> We are interested instead in how the packaging and framing of redistribution influences the political action costs of enacting and maintaining it.

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125. Rent-seeking by the rich is arguably a major cause of rising inequality. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 39–64 (2012); Josh Bivens & Lawrence Mishel, *The Pay of Corporate Executives and Financial Professionals as Evidence of Rents in Top 1 Percent Incomes*, 27(3) J. ECON. PERSP., Summer 2013, at 57, 62–71; Orbach, *supra* note 91, at 48–55. See generally Gerrit De Geest, *Removing Rents: Why the Legal System Is Superior to the Income Tax at Reducing Income Inequality* (Washington Univ. in St. Louis Sch. of Law Legal Studies Research Paper No. 13-10-02, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337720](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337720).

126. See Jolls, *supra* note 26, at 1658–74. For example, a legal rule that collects more from wealthy tortfeasors would apply only to the subset of wealthy people involved in accidents—the odds of which people are likely to underestimate. A counterargument is that insurance markets could turn the uncertain loss into a more certain one. See Logue & Avraham, *supra* note 32, at 199–201. *But see* Jolls, *supra* note 26, at 1663–66 (observing that insurance does not yield complete certainty, given factors like deductibles and experience rating). Though we find Jolls’s arguments somewhat persuasive, nothing in this paper depends on accepting them. Our arguments apply whether the assumption that the labor-leisure distortion is invariant across methods of redistribution is true or false.

For example, one of the most consistent and important findings of prospect theory is that people weight losses more heavily than gains.<sup>127</sup> Thus, framing a particular interaction as one that produces a loss would be expected to generate more disutility and more political resistance than framing it as a mere failure to achieve a gain. Legal rules and policies that have distributive implications might be susceptible of either frame, depending on how they are presented and perceived. Although design details can accentuate or downplay this effect, tax-and-transfer mechanisms tend to highlight the taking away of something from a person who had previously been endowed with it, and hence are likely to set off cognitive alarms that might be more muted where institutional arrangements assign resources in a different manner in the first instance. Consider this example:

*Human Organs.* Imagine that at the moment a new transplant technology first becomes medically possible, the state enacts a law that does two things: (1) it permits medical institutions, under some circumstances, to buy certain human organs; and (2) it effectively prohibits individuals from purchasing organs, forcing allocation by some institutional notion of medical need.

This rule has a strong distributive effect favoring the poor (the poor would have the option of selling, but would not have to outbid the rich to obtain organs). Yet because it is enacted at the moment that transplantation surgery first becomes possible, the fact that the wealthy cannot outbid the poor for their organs is unlikely to be experienced as a loss. The rule prevents the value of wealth from rising by forbidding one possible new use,<sup>128</sup> but nothing is “taken” from the wealthy, neither money nor a previously exercised privilege. The alternative policy, based on tax superiority, might instead tax the rich and use the

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127. See, e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979); Nathan Novemsky & Daniel Kahneman, *The Boundaries of Loss Aversion*, 42 *J. MARKETING RES.* 119, 123–25 (2005) (noting some limits on loss aversion, including its absence in contexts where money is spent “as intended” for purchases). The same economic impact can be coded as a loss or as a failure to achieve a gain, depending on how the outcome is framed. See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOL.* 341, 333–34 (1984).

128. Constraining the sphere of money cabins its power and reach. See generally MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY* (2012); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

revenue to give the poor more money, which they could use for buying organs if they so chose. In this case, however, the added tax would take away money the rich had previously earned (even though they would receive implicit compensation by now being able to use the rest of their wealth to bid for organs in an open market, albeit against poor people who are now somewhat less poor). Here, the non-tax mechanism plausibly has lower political action costs than the tax mechanism.

Although the timing of the distributive rule to coincide with the emergence of a new technology helps to do the framing work in *Human Organs*, other factors such as bundling can also contribute to framing. Consider:

*Landfill.* An agency must choose a neighborhood in which to site a landfill. Such a locally undesirable land use will cause property values in the surrounding area to fall. Because this drop in property values will likely result in lower-income people living near the landfill (whether they were there initially or not) there is an efficiency case for placing the landfill in the less wealthy neighborhood.<sup>129</sup> Suppose this causes an unwanted distributive result—making people who are already less well-off even worse off. This distributive problem could be addressed in one of two ways: (1) by granting the low-income neighborhood in which the siting will occur a countervailing set of valuable rights over the landfill's operation, priority for jobs at the landfill, priority for local redevelopment efforts, and so on; or (2) a tax-and-transfer system could redistribute to low-income people to make up for the fact that efficient land use decisions will often disadvantage them distributively.

Under the first approach, the role of “landfill host” would comprise a unified package of benefits and detriments—and the benefits might be of sufficient magnitude to cause competition over which neighborhood will get to host the landfill.<sup>130</sup> This

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129. For a discussion of the fairness and efficiency implications of different siting choices, some of which may turn on the responses of neighboring populations to those choices, see generally Vicki Been, *What's Fairness Got To Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); cf. ADLER & POSNER, *supra* note 12, at 143–44 (providing an example involving the converse case of siting a park that would increase property values, potentially spurring the rich to move in and the poor to move out).

130. Similarly, past distributive impacts of siting decisions might be addressed in kind, as through the transformation of a former landfill site into a

bundling of benefits with detriments involves some inefficiencies, including the possibility that the benefits will be less valuable to recipients than the cash equivalent would be. Low-income households may also be imperfectly targeted by the assistance. But the bundling avoids the need for a second, and overtly redistributive, step. The second approach allows the efficient, uncompensated siting to go forward, thus generating a new baseline in which low-income people have suffered this disadvantage (along with many others wrought by efficient legal rules). There is no way to address this distributive result through tax without causing some people to suffer a loss from the new baseline—something that will be coded as a stand-alone loss, and heavily resisted as such.

Even within the domain of taxes, political action costs can vary. A growing literature on tax salience examines how both political and market responses can vary depending on the degree of attention a particular tax attracts.<sup>131</sup> Taxes that can be made lower-salience, as through paycheck withholding or bundling with mortgage payments, may carry lower political action costs.<sup>132</sup> Bundling redistribution with various forms of social

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park area. See PETER HARNIK, URBAN GREEN: INNOVATIVE PARKS FOR RESURGENT CITIES 90 (2010) (observing that the redevelopment of former landfills into parks may offer “the opportunity to correct what may have been a longstanding environmental injustice to the surrounding residents”).

131. See, e.g., Raj Chetty, Adam Looney & Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145 (2009); David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19 (2011); Andrew T. Hayashi, *The Legal Salience of Taxation*, 81 U. CHI. L. REV. 1443 (2014); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253 (2011); Jacob Goldin, *Optimal Tax Salience*, 131 J. PUB. ECON. 115 (2015). Although this literature is relatively new, the underlying intuition—that salience matters—is not. Decades ago, Milton Friedman expressed concern that the explicit nature of the redistribution accomplished through a negative income tax could create particular political difficulties. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 194 (1962).

132. See, e.g., DEAN BAKER, CTR. FOR ECON. & POLICY RESEARCH, THE BIG TAX INCREASE NOBODY NOTICED (Sept. 2014), <http://www.cepr.net/documents/ss-poll-2014-08.pdf> (reporting and commenting on survey results showing that few respondents were aware of the expiration of a payroll tax reduction in 2013 that increased payroll taxes by two percentage points); Hayashi, *supra* note 131, at 1484–85 (finding homeowners are less likely to appeal property tax assessments when the salience of the tax is reduced through mortgage escrow); see also Gamage, *supra* note 31, at 70 (observing that food purchases are exempted from VATs and sales taxes, but not from income taxes, and positing that such differential treatment “depend[s] significantly on the framing of different tax instruments—on what forms of special provisions strike political actors as acceptable within different tax instruments”).

insurance, so that the loss is packaged with a potential future benefit, can also make the redistributive element less evident and hence less heavily resisted. All of these manipulations raise normative questions, as we discuss below.<sup>133</sup> Regardless of where one comes out on the normative issues, however, the very fact that there is often heated debate over how painful and apparent redistribution should be suggests that political results can vary with a program's framing. If this were not the case, then nothing would turn on decisions that implicate tax salience.

Other work finds that people will assess the fairness of a tax differently based on details like whether the tax rates are expressed in dollars or percentages and whether the tax system is bifurcated into separate pieces or unified.<sup>134</sup> It is well recognized that penalties and subsidies are often viewed differently, despite their identical economic impact. A standard example illustrating this point is the different reactions to a child subsidy provided to households versus a childlessness tax imposed on households. Nearly all respondents think that a child subsidy should be larger for low-income families. But when the frame is flipped and the measure is recast as a tax on childlessness, few respondents think that low-income households should be taxed more heavily for *not* bearing children.<sup>135</sup> More broadly, tax deductions are viewed quite differently from direct government grants, despite their identical economic substance.<sup>136</sup>

The cognitive literature thus establishes that people respond differently to measures that have identical incidence depending on how the measures are presented. This variance in responses in experimental settings tracks the variance in political responses that presumably underlies all manner of rhetori-

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133. See *infra* text accompanying notes 195–204.

134. See, e.g., Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1755–57, 1765–68 (2005).

135. The example is from Schelling, and the reversal is known as the Schelling effect. Thomas C. Schelling, *Economic Reasoning and the Ethics of Policy*, 63 PUB. INT. 37, 53–56 (1981). More recent experiments by McCaffery and Baron show the same effect. See McCaffery & Baron, *supra* note 134, at 1757–59.

136. For example, Justin Wolfers asked how many people would support the home mortgage deduction if it were framed as an “explicit government handout” that benefits those in the top 1% about twenty-five times more than middle-class households. Justin Wolfers, *Tax Deductions or Tax Expenditures?* FREAKONOMICS (Apr. 17, 2012), <http://freakonomics.com/2012/04/17/tax-deductions-or-tax-expenditures>.

cal and policy choices.<sup>137</sup> The cognitive variance supported by existing work strongly undermines the claim of distributive invariance. If economically equivalent measures can morph from acceptable to unacceptable or vice versa due to substantively irrelevant features, we should not expect that the political action costs associated with enacting different measures will be invariant. And if political action costs are not invariant across different methods and formulations of redistribution, then it follows that the amount of redistribution that can be accomplished through different methods and formulations would also vary.

One objection might be that for any optimally framed and presented non-tax legal rule or public policy, there is a superior optimally framed and presented tax-and-transfer mechanism. It is not clear this is the case, however. An especially interesting finding in the experimental literature to date is the extra aversion that people attach to charges that are labeled as taxes.<sup>138</sup> Moreover, when a salary is stated in pre-tax terms, the difference between this amount and what the employee gets to keep inevitably appears as a loss. To the extent that loss aversion or an endowment effect makes losing things that one already has more painful than not receiving things that one never had, tax-and-transfer may be categorically more cognitively painful than alternative approaches that channel entitlements to the less well off in the first instance or that structure allocation systems to produce less salient cross-subsidies.<sup>139</sup> Recent work also suggests that distrust of government may produce less support for redistribution that takes the form of taxes than for redistribution that can be accomplished without running money through the government's coffers.<sup>140</sup>

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137. For example, the strategic characterization of the estate tax as a "death tax" by its opponents has been credited with catalyzing its widespread political unpopularity (which seemed objectively puzzling, given its extraordinarily narrow targeting). *See, e.g.*, STEVEN M. SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE 144 (2013) ("The conservative leadership sculpted the estate tax's image; they labeled it the 'death tax' to influence the public to confront it as an ominous, universal problem.").

138. *See, e.g.*, Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL'Y & L. 106, 117–19 (2006) (describing these findings); *see also* Edward J. McCaffery & Jonathan Baron, *Framing and Taxation: Evaluation of Tax Policies Involving Household Composition*, 25 J. ECON. PSYCHOL. 679 (2004).

139. This point also connects to our discussion in the next section, which examines how perceptions of fairness interact with political palatability.

140. *See* Ilyana Kuziemko, Michael I. Norton, Emmanuel Saez & Stefanie Stantcheva, *How Elastic Are Preferences for Redistribution? Evidence from*



## D. FAIRNESS PREFERENCES

K&S have famously argued that fairness (which they take to include any non-welfare value, such as morality, justice, or dignity) has no value apart from its effect on welfare.<sup>141</sup> We will not quarrel with this proposition, but will instead focus on an important way in which fairness considerations can affect welfare: by producing distributive variance. Of particular relevance to the present discussion is the capacity for a policy or rule's alignment with fairness intuitions to reduce the political resistance associated with its adoption, or to raise the political action costs that would be associated with counteracting it through some other political means.

## 1. Fairness Preferences as Inputs to Political Action Costs

Individuals typically possess a variety of beliefs and preferences about what is "fair" or "unfair" in particular contexts. They frequently think of justice in a local micro-setting, such as fairness among neighbors or co-workers, rather than only what is fair in a global sense.<sup>142</sup> Put in terms of our critique of the invariance hypothesis, more redistribution might be done (or the same amount might be done more cheaply) through methods perceived as fair than through methods perceived as unfair.<sup>143</sup> If the degree to which a particular redistributive effort resonates with fairness preferences bears on how cheaply, effectively, and durably it can be carried out, then the study of fairness becomes an important input into welfare maximization efforts that depend on achieving particular distributive outcomes.<sup>144</sup>

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*Randomized Survey Experiments*, 105 AM. ECON. REV. 1478, 1505 (2015) (finding people resisted changing their views on redistribution in light of new information because they distrusted government, and that they were therefore most affected by information favoring redistribution "for indirect transfer programs such as the minimum wage that do not involve the government collecting and redistributing tax dollars").

141. The thrust of their view is encapsulated in the title they chose for their book exploring this point, FAIRNESS VERSUS WELFARE. See KAPLOW & SHAVELL, *supra* note 23.

142. See generally JON ELSTER, LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS (1992); YOUNG, *supra* note 85; Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986).

143. Our concern here is with perceptions of fairness, which are subject to a variety of manipulations through policy design, not with making any statements about what is or is not fair in some deontological sense.

144. This is one of several reasons why fairness considerations are relevant

This point is subtly different from the one K&S and other law and economics scholars make when they recognize that people may have preferences for fairness, and that satisfying those preferences, like satisfying any other preference, can increase welfare directly (that is, people are made better off by directly experiencing and observing fairness). This is certainly true, and on its own may be extremely important, given that some preferences for fairness can only be satisfied within particular legal contexts.<sup>145</sup> But we also envision an instrumental role for fairness, as a factor that can reduce the political action costs associated with redistribution.

In other words, using fairness criteria to select and formulate redistributive legal rules could ease the political path for those rules. Moving a certain number of dollars from one income class to another might generate less political resistance when done through a substantive legal rule that is popularly perceived as fair than through a tax-and-transfer system that is widely viewed as unfair.<sup>146</sup> Compare, for example, living wage legislation or housing supports that enable workers to live in the communities in which they are employed with a tax-and-transfer program that draws from and benefits the same income classes.<sup>147</sup> The public might perceive in the latter case but not the former that we are taking away money from people who have “earned it,” and giving it to others who have not.<sup>148</sup>

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to the economic analysis of law. *See generally* Lee Anne Fennell & Richard H. McAdams, *Introduction*, in *FAIRNESS IN LAW AND ECONOMICS* xiii (Lee Anne Fennell & Richard H. McAdams eds., 2013).

145. *See* Yoram Margalioth & Tomer Blumkin, *Targeting the Majority: Redesigning Racial Profiling*, 24 *YALE L. & POL'Y REV.* 317, 340–42 (2006) (arguing that equity considerations favor the use of legal rules rather than tax-and-transfer in the context of racial profiling).

146. This follows from the fact that monetary outcomes are not the sole determinants of people's evaluations. *See, e.g.*, Daphna Lewinsohn-Zamir, *Taking Outcomes Seriously*, 2012 *UTAH L. REV.* 861.

147. This comparison assumes that the legislation in question would actually benefit the target income class, notwithstanding any supply effects or contracting-around that might occur. Although the empirical questions are complex, there is some evidence that minimum wage laws, for example, can have a net redistributive effect. *See* Liscow, *supra* note 2, at 2498 n.46 (reviewing research on this point). Regardless of whether one agrees with these specific examples, as long as the universe of rules that both resonate with fairness preferences and manage to redistribute in a preferred direction is not a null set, the reasoning in the text holds.

148. *See, e.g.*, KEREN-PAZ, *supra* note 45, at 49 (arguing that “a transfer payment is more likely to submit the poor to attacks that they are lazy, unproductive and a burden on hard-working taxpayers” than a change in tort compensation rules that is understood as “a manifestation of the substantive

If common attitudes about deservingness or desert apply differently for substantive legal rules than for the tax system, then the political action costs of redistribution through these mechanisms will be asymmetric as well. Resistance to overt redistribution of income is often fueled by the belief that the market system reliably delivers distributionally fair outcomes to individuals, and that, therefore, any shortfalls in outcomes can be readily connected to personal shortfalls of character or effort.<sup>149</sup> Those who benefit from the system may easily overlook the ways in which it fails to meet this model.<sup>150</sup> Institutional changes to the “rules of the game” that generate market results may have a more powerful and stickier effect on distributive results if they are understood to be part of an essentially fair process for producing outcomes. Not only are these changes more likely to be accepted in the first instance than a change that moves money around after the fact in a separate step, they are less likely to be counteracted.

Just as payments for different reasons are not viewed as fungible with each other, so too may the amount of assistance realistically available depend on the form that it takes and the restrictions that it implicitly or explicitly places on recipients. Consider, for example, the debate about whether assistance to poor people should be provided through an unrestricted cash grant or rather in-kind, through food stamps, housing vouch-

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notion of equality before the law according to which it is unacceptable to systematically expose the poor to higher risks”); MURPHY & NAGEL, *supra* note 58, at 35 (“If people intuitively feel that they are in an absolute sense morally entitled to their net incomes, it is not surprising that politicians can get away with describing tax increases (which diminish net income) as taking from the people what belongs to them.”).

149. See F. A. HAYEK, 2 LAW, LEGISLATION, AND LIBERTY, THE MIRAGE OF SOCIAL JUSTICE 73–74 (1976) (expressing ambivalence about “whether without such partly erroneous beliefs [in the deservingness of wealth] the large numbers will tolerate actual differences in rewards which will be based only partly on achievement and partly on mere chance”).

150. For discussions of the self-serving bias, see Linda Babcock & Joshua Furgeson, *Bounded Rationality in the Settlement Process: Empirical Evidence on the Causes of Settlement Failure in Litigation*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 360 (Jennifer Arlen ed., 2013); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); Linda Babcock, George Loewenstein, Samuel Issacharoff & Colin Camerer, *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995). For discussion of the literature on systems justification bias, see SHEFFRIN, *supra* note 137, at 49–53. For a general claim that people interpret evidence in light of their cultural commitments, see generally Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003).

ers, and so on. An unrestricted cash grant might be expected to do a better job of advancing the welfare of recipients because they can spend on whatever they value most. But in-kind provision of assistance is ubiquitous, and it seems extraordinarily unlikely that the political will would exist to replace all such programs with their cash equivalents.<sup>151</sup> One reason might be that people view those who are less well off as having only a moral claim on certain kinds of resources that better their condition in certain well-defined ways.<sup>152</sup> Changing the form may remove the rationale.<sup>153</sup>

Similarly, redistribution prompted by discrete misfortunes that were plainly out of the control of the victim will garner more political support than redistribution prompted by chronic need or an abstract concern with the state of the Gini coefficient.<sup>154</sup> An obvious example is disaster relief. Although such relief presents well-known moral hazard concerns,<sup>155</sup> it may also achieve increments of redistribution that are unlikely to be replicated through (or undone by) tax-and-transfer.

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151. See Steven Kelman, *A Case for In-Kind Transfers*, 2 *ECON. & PHIL.* 55, 57 (1986) (suggesting that the decision to provide assistance is unlikely to be independent of the choice about how to provide it); Hylland & Zeckhauser, *supra* note 63, at 282–83 (discussing the possibility that “elimination of direct transfer programs would have relatively little impact on the progressivity of the tax system and on balance would harm the poor,” as well as the converse possibility).

152. See Kelman, *supra* note 151, at 62 (“It is from the right to life and the right to be spared from living in degrading circumstances that justifications for rights to health care and to a minimum standard of living can be developed.”); Hylland & Zeckhauser, *supra* note 63, at 282–83 (noting that people may be “more ‘goods egalitarians’ than ‘income egalitarians’”).

153. See Kelman, *supra* note 151, at 63 (“[W]hat would be the impact of a decision to move from provision of health care or food stamps to provision of their cash equivalent? Simply put, such a decision would destroy the justification for the policy in the first place.”).

154. *Id.* at 69 (observing that preferences for helping disadvantaged people are sensitive to “the context in which the issue is presented” and that “presenting the problem of the disadvantaged in a multiplicity of contexts, tied to specific problems they face, will tend to increase the willingness of the non-disadvantaged to help, compared to a situation where the problem is presented in a single abstract context”); see also Hylland & Zeckhauser, *supra* note 63, at 282–83.

155. See, e.g., Louis Kaplow, *Incentives and Government Relief for Risk*, 4 *J. RISK & UNCERTAINTY* 167 (1991); Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 *J. CONTEMP. LEGAL ISSUES* 161, 176–84. (2003). Interestingly, the rhetoric of disaster was used during the Depression to galvanize support for social insurance. See Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 *LAW & SOC’Y REV.* 257 (1999).

## 2. Punishment Preferences

Fairness preferences include preferences for the punishment of wrongdoers, what an experimental literature calls “altruistic punishment.”<sup>156</sup> Humans are willing to incur costs to make sure that the punishment of wrongdoers occurs even when it can create no possible strategic gain for the individual, other than satisfying the revealed preference for punishment. Indeed, people are willing to incur these costs even when they were not the victim of the transgression. Thus, fairness preferences demand that people who wrongly gain at the expense of others should suffer a loss.

We will go a step further than the experiments and conjecture that if people will pay to punish (real or perceived) wrongdoing, despite the fact that it will not improve their payoffs, they would also incur costs to prevent the wrongdoing, even if it will not improve their payoffs. That premise reveals another way that the mode of distribution affects the quantity of distribution: people might choose to bear the cost of living in a world with suboptimal (in their view) levels of redistribution in order to avoid a particularly despised form of redistributive leakage—that in favor of a recipient who is cheating the system.

Imagine a taxpayer choosing between two redistributive policies: policy *A*, which takes the form of a tax-and-transfer program, and policy *B*, which is a redistributive legal rule. Both schemes have “leakage” that takes the form of distributing income towards the wrong people—the non-poor, say, when the appropriate targets are only the poor. In equilibrium, policy *A* mis-targets to one person out of 100 per time period and appropriately provides assistance to the other 99 targets. In equilibrium, policy *B* mis-targets to ten people out of 100 per time period and appropriately provides the same level of assistance to the other 90 targets. It would seem that policy *A* strictly domi-

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156. See Ernst Fehr & Urs Fischbacher, *Human Altruism—Proximate Patterns and Evolutionary Origins*, 27 ANALYSE & KRITIK 6, 8 (2005) (“The ultimatum game . . . nicely illustrates that a sizeable number of people from a wide variety of cultures facing high monetary stakes are willing to hurt others to . . . punish unfair behaviour.” (internal citations omitted)). Newer experiments confirm this result when the potential punisher was not himself a victim of the wrongdoing. See Ernst Fehr & Urs Fischbacher, *Third-Party Punishment and Social Norms*, 25 EVOLUTION & HUM. BEHAV. 63 (2004); Joseph Henrich et al., *Costly Punishment Across Human Societies*, 312 SCIENCE 1767 (2006); see also Dominique J.-F. de Quervain et al., *The Neural Basis of Altruistic Punishment*, 305 SCIENCE 1254 (2004) (reporting that neural images of subjects undergoing a punishment experiment reveal that effective punishment of norm violators activates a reward center in the brain).

nates policy *B*. But suppose that for *A* the one inappropriate recipient is a cheat, someone who makes himself eligible by fraud, and it is impossible (given the costs) to eliminate the 1% fraud. For policy *B*, the wrong targets are not cheats; they are the passive beneficiaries of an inefficient legal rule or program that haphazardly distributes in the wrong direction 10% of the time.

Anyone might still regard policy *B* as superior if the susceptibility of policy *A* to intentional wrongdoing means that the cheating rate would or might increase over time. But let us suppose that these numbers represent deterrent equilibria with steady state leakage rates of 1% and 10%, respectively. Without punitive preferences, it is now obvious that citizens would pick policy *A* over policy *B*. With punitive preferences, however, they might anticipate more disutility from policy *A* if they know that unpunished and effectively unpunishable cheats will exploit it, and therefore prefer policy *B*.<sup>157</sup> Indeed, if we consider the welfare losses to citizens with these punitive preferences, policy *A*'s redistribution might represent a net loss in welfare, even though it would represent a net gain if these preferences did not exist. As a result, voters who are unwilling to adopt policy *A* may be willing to adopt policy *B*. It may, therefore, be politically possible to redistribute more through policy *B* than through policy *A*.

By offering this example, we do not mean to argue that tax-and-transfer is always or inherently more prone to cheating (or perceived cheating) than redistributive legal rules. Legal rules can also be abused by wrongdoing claimants. Our only point is that there is no reason to assume that the political action costs associated with cheating are exactly equal across all policies, nor that they always favor the mechanism of tax-and-transfer. In at least some contexts, the more efficient form of redistribution, judged by the total quantity of leakage, may also be more politically objectionable due to the *quality* of that leakage. If one form of distribution offends fairness preferences more, there may still be room for more of the distribution that offends them less.

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157. A closely related point is that equivalent behavioral distortions may generate differential amounts of disutility among those observing the distortion. Thus, even if we accept the argument that legal rules distort the labor-leisure choice just as much as direct transfers, non-recipients who observe recipients electing leisure over labor may feel far more outraged when the transfers are provided on a stand-alone basis, rather than as an accompaniment to, say, a tort judgment following an injury.

### 3. Fair Bundles

This discussion has mostly focused on the role of fairness perceptions in constructing the preferences that are inputs into political action—the “decision-influencing” phase of political action costs. But fairness considerations can also affect the search or “opportunity spotting” phase as well. Interactions in which low-income individuals have been wronged or disadvantaged by others present natural opportunities to address distribution in a manner consonant with fairness intuitions. Offering transfer payments for a defensible reason sounding in fairness (e.g., corrective justice) is politically different, and (we argue) easier, than offering transfer payments for no reason other than a net gain in social welfare.<sup>158</sup>

Recall the *Landfill* example, where one option is to tie the siting of a landfill with benefits that go to the neighborhood where the landfill is placed. We introduced the example to describe the importance of framing, but it may also work because voters more readily perceive the compensatory bundle as fair than they would perceive a general system of tax-and-transfer that might have the same distributive result for the neighborhood. The same logic lies behind Trade Adjustment Assistance programs, where Congress attempts to set up job training programs and other benefits targeted to the individuals who lose employment as a result of a free trade agreement.<sup>159</sup> One could again rely on a general system of tax-and-transfer, but the public is likely to perceive the redistribution as more fair when paired with a specific burden. Our point is not that a deontological theory of corrective justice justifies the distributive benefit (it may or may not), but rather that the public perception of corrective justice eases the political path for providing that benefit.

This general point is even more apparent if we shift to a context where there is no direct analogue to a centralized tax-and-transfer mechanism. Consider, for example, the question of how the burdens of carbon reduction should be allocated among countries, given that some developed earlier than others and some are wealthier than others. In a recent book, Eric Posner

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158. The reason for the payment may also affect how it is valued by the recipient. See Lewinsohn-Zamir, *supra* note 33, at 357–58.

159. See Eleanor Roberts Lewis & Harry J. Connolly, Jr., *Trade Adjustment Assistance for Firms and Industries*, 10 U. PA. J. INT'L BUS. L. 579 (1988); Frank H. Morgan & Helen Wong, *Trade Adjustment Assistance Cases: 2007 Developments*, 40 GEO. J. INT'L L. 99 (2008).

and David Weisbach argue that the desire to help poor countries (which they endorse) should be kept conceptually separate from questions of what to do about carbon reduction.<sup>160</sup> They do not rule out the possibility that a climate change treaty could turn out to be a desirable redistributive vehicle, deeming it an empirical question.<sup>161</sup> However, they make clear that any such redistributive approach must prove its merits *as a redistributive vehicle* when compared against other possible redistributive methods.<sup>162</sup>

But other possible redistributive methods remain nothing more than theoretical abstractions until they are reduced to real-world mechanisms that are under the control of some decisionmaker with the authority and desire to actually make the transfer.<sup>163</sup> Setting up such a redistributive channel involves large political action costs. Finding a decisionmaker with both the power and the preferences to get the job done is made all the more difficult if the job in question is defined as a stand-alone act of redistribution (essentially, an act of charity), rather than representing elements of something else—like ability-to-pay adjusted contributions to a common goal, or a squaring-up of past injustices. If decisionmakers are already coming together to create a treaty aimed at substantive objectives, especially ones that have significant distributive implications, then the ready-made channel this provides for carrying out distributive objectives should be explored, not rejected out of hand until it can prove its superiority to all other *potential* methods of redistribution.

In sum, the costs of finding an appropriate mechanism for accomplishing redistribution argues for bundling together rather than separating distributive goals and other substantive

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160. ERIC A. POSNER & DAVID WEISBACH, CLIMATE CHANGE JUSTICE 73 (2010) (arguing that any claims that wealthy countries should bear a larger responsibility “improperly tie valid concerns about redistribution to the problem of reducing the effects of climate change”). Separately, they reject a corrective justice rationale for burdening the developed countries more heavily. *See id.* at 99–118.

161. *See id.* at 117 (viewing it as “conceivable (but unlikely) that a climate treaty could turn out to be a good way to redistribute wealth”).

162. *See id.* at 75, 80–96, 176–78 (specifying the empirical findings that would be required to support such a redistributive approach).

163. Adler and Posner recognize just this point in their work on cost-benefit analysis. *See* ADLER & POSNER, *supra* note 12, at 144 (observing that even though it might be better to pair an efficient siting decision with a transfer payment, “[w]e know of no agency in the U.S. government that has the authority to order wealth transfers, and there are many good reasons for denying agencies this authority”).



goals, especially where doing so will enable the leveraging of fairness intuitions to support the distributive move (whether or not those intuitions would survive philosophical scrutiny). Here, as elsewhere, any savings on political action costs and uniquely achievable distributive gains must be weighed against efficiency losses that may come from using a particular redistributive vehicle. But attention to political action costs offers reasons for investing in making the calculation.

#### 4. A Note About Domain

A possible objection to our focus on the role of fairness in constructing political action costs is that we have shifted our attention outside of the proper domain of “redistribution” in which prescriptive tax superiority holds. K&S explicitly state that they are limiting their discussion to “the overall distribution of income or wealth, not entitlement to payment based on desert.”<sup>164</sup> Perhaps one would say that if there is a strong public view about the fairness of a particular legal rule or distribution, then we are no longer in the domain to which simple income redistribution applies.

Yet there is no way to cleanly separate income distribution from matters of individual desert. Consider first a legal rule that might seem to sit clearly outside of the domain of redistribution: a ban on racial discrimination in employment. The desert-based justification for protecting individuals from discrimination does not explain why civil rights laws forbid only some parties to discriminate and not others: employers but not employees;<sup>165</sup> public accommodations but not customers;<sup>166</sup> landlords but not homeseekers.<sup>167</sup> There are many reasons why we

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164. Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 667 n.2.

165. For example, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2012), prohibits employers from discriminating against employees in various ways, but not employees from discriminating against employers.

166. Public accommodations are prohibited from discriminating against customers on the basis of race, but customers are not banned from discriminating on the basis of race against the owners or managers of public accommodations. See Michael Blake, *The Discriminating Shopper*, 43 SAN DIEGO L. REV. 1017 (2006); Katharine T. Bartlett & G. Mitu Gulati, *Discrimination by Customers* (Duke Law Sch. Pub. Law & Legal Theory Series No. 2015-4, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2540334](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2540334).

167. See, e.g., *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990) (“[C]ustomer preference, in this [Fair Housing Act] setting, is a noninvidious reason—a reason not forbidden by the statute—because the statute is for the protection of customers.”). But see Lee Anne Fennell, *Searching for Fair Housing* (unpublished manuscript, on file with author, 2015) (reexamining the assumption that fair housing laws do not reach homeseekers).

might see these patterns, but one possibility might be to beat back forms of discrimination that are especially damaging to one's income or wealth. If so, we might understand bans on racial discrimination (and discrimination on other protected grounds) as non-tax rules that in fact address important sources of income inequality.<sup>168</sup> Yet because these laws align with the public preference against the unfairness of discrimination, they are more politically feasible than achieving the same result via tax-and-transfer.

On the other end of the spectrum, programs that seem clearly redistributive, like the EITC, food stamps, and Temporary Assistance for Needy Families (TANF), involve a strong element of desert. Consider the work requirements that helped make TANF and the EITC politically acceptable and the exclusion of felony drug offenders from even the food stamp program.<sup>169</sup> If "entitlement[s] to payment based on desert" can be understood broadly enough to reach even the actual welfare programs that exist in the world, then virtually no redistributive legal rules would fall entirely within the distributive domain. One could then concede the principle of prescriptive tax superiority but avoid it in every case of interest.

This is plainly not what proponents of tax superiority have in mind. Indeed, K&S themselves appear to contemplate the domain of tax superiority reaching into areas like tort and contract law to preclude distribution-sensitive divergences from efficiency,<sup>170</sup> even though those fields also embed desert-based notions. Yet K&S presumably would not want to replace every

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168. See Blumkin & Margalioth, *supra* note 31, at 14–18 (arguing that doctrinal bans on private race discrimination address distributional issues better than race-sensitive taxes); *id.* at 18–21 (arguing that doctrinal bans on racial profiling by police address distributional issues more cheaply than tax). For evidence that civil rights laws increased income for African Americans, see James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989); John J. Donohue III & James J. Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603 (1991). See also Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 953–85 (2003) (arguing that the ADA can be understood as welfare reform and suggesting that this characterization could explain doctrinal restrictions in the case law).

169. See 21 U.S.C. § 862(a) (2012) (making those convicted of certain drug felonies ineligible for various forms of assistance, including nutritional assistance, subject to state opt-outs); *Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000) (upholding this provision against constitutional challenges).

170. See Markovits, *supra* note 5, at 565–66 (noting this point).

law's distributive incidence with tax-and-transfer. Antidiscrimination law provides an especially compelling example,<sup>171</sup> but similar points might be made about, say, compensation requirements in tort and property that have distributive effects even as they respond to wrongs.<sup>172</sup>

To be sure, cabining off certain domains as too desert-infused to count as redistribution might help to prop up the invariance hypothesis (through the simple expedient of removing from the analysis a set of distributive changes that we would not expect to see replicated or countered through tax law). But if welfare is the goal, all distributive changes count, whether delivered through nominally redistributive measures or otherwise. Here, as elsewhere, the presence of positive political action costs introduces the possibility that one redistributive route will be more successful than another, producing distributive variance.

### III. THE IMPLICATIONS OF POSITIVE POLITICAL ACTION COSTS

Positive political action costs, like positive transaction costs, radically change the operating environment for maximizing welfare. Just as positive transaction costs introduce the possibility of divergence between the existing allocation of re-

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171. Economics does not have a clear agreement on the normative justification for the ban on race discrimination. Richard Epstein famously argued against the prohibition on race discrimination in employment, partly from an economic perspective. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992). For efforts to justify such laws within economics, see John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583 (1992) (reviewing Epstein's book); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

172. The response might be that these other laws have an impetus other than altering distribution; they are responding to a wrong first and foremost, and only incidentally affecting distribution. But on further examination, many compensation requirements (like those associated with the Takings Clause, or with tort liability) can be recast as forms of social insurance. See, e.g., Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269 (1988). Redistribution is of course often cast in exactly these terms as well. See, e.g., Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). Conversely, many redistributive measures are prompted not by income statistics or Gini coefficients but by discrete events that have unfairly impacted their victims—if not “wrongs” as such, then at least identifiable misfortunes. See Landis, *supra* note 155.

sources and the efficient allocation, positive political action costs introduce the possibility of divergence between the existing distributive results and those that would maximize welfare.<sup>173</sup> This possibility follows as a matter of logic from the fact that different distributive results are possible depending on how redistribution is carried out—that is, from the failure of the invariance hypothesis. And, importantly, the point holds regardless of whether one believes that current levels of redistribution undershoot or overshoot the welfare-maximizing level. By analogy, one need not take a stand on whether polluting factories or polluted-upon homeowners should receive more or fewer entitlements in the world in order to believe that transaction costs can interfere with efficiency. Our point is equally fundamental: in the presence of positive political action costs, we cannot wave away the possibility that our political system will fail to achieve welfare-maximizing distributive results.<sup>174</sup>

In this Part, we first examine the parallel between political action costs and transaction costs. Second, we explore the case for doctrinal redistribution. In these two sections we raise and respond to some possible objections to our analysis. In the third section, we offer some directions for future research into political action costs.

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173. Of course, different actors and entities will have different views about what constitutes distributive optimality. For concreteness, and not by way of limitation, it may be helpful to think of society possessing a social welfare function that tracks the distributive preferences of the median voter or citizen—although much evidence suggests citizens don't know the actual distribution of their nation. See *supra* note 87 and accompanying text. Welfare maximization might also be assessed based on a social welfare function derived from exogenously selected principles. Our point here is very general: for any given social welfare function, there may be a divergence between the distribution that would maximize welfare and the distribution the political system actually produces.

174. The analogy we draw between the Coase Theorem and the problem of political action costs is not original to us. See Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 J. COMP. ECON. 620 (2003). Acemoglu argues that societies pursue inefficient policies due to certain kinds of transaction costs inherent to the political realm, including the inability to bind future decisionmakers. These costs explain why a society capable of achieving redistribution in a less efficient way could not simply bargain to have that same increment of redistribution handled through the tax system. See also Weisbach, *Distributionally Weighted Cost-Benefit Analysis*, *supra* note 36, at 177 (questioning why bargaining would not produce redistribution through the most efficient means and suggesting that those urging non-tax redistribution must rule out this possibility).

## A. THE PROBLEM OF POLITICAL ACTION COSTS

We can begin, in Coasean fashion, by examining the sort of invariant distributive results we would get if political action costs were zero. In this world, it matters not at all how legal rules and institutional arrangements affect distribution, because a costless redistributive mechanism will instantly and perfectly correct any distributive infelicities. No one concerned with distribution would have any incentive to attempt to accomplish distributive goals through means other than the costless tax-and-transfer system, for all the reasons that K&S and others have detailed. First, it would introduce distortions, and second, it would be ineffective in changing the distributive picture because Congress (or whatever fanciful body would make decisions in a world of zero political action costs) could costlessly offset it.

Indeed, K&S's result of formal tax superiority is a purely conceptual demonstration analogous to that undertaken by Coase: for any quantum of redistribution that might be accomplished through legal rules, there exists (in theory) a tax-and-transfer method that would be superior.<sup>175</sup> This is analogous to saying that for any quantum of government coercion that might be used to place resources in the hands of a higher valuer, there exists (in theory) a private bargain that would be a better way to accomplish that shift. Just as we do not derive from the Coase Theorem a general principle of "transaction superiority" (given transaction costs), we cannot derive from K&S's demonstration any general prescriptive principle of "tax superiority" (given political action costs). Instead, Coase's work was designed to focus attention on the existence of transaction costs.<sup>176</sup> The K&S demonstration should likewise turn our at-

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175. See Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 669 ("[A]ny regime with an inefficient legal rule can be replaced by a regime with an efficient legal rule and a modified income tax system designed so every person is made better off."). In addition, in later solo work, Kaplow has expressly characterized an analysis of externality control that employs the premise of distributive neutrality as a theoretical exercise rather than a basis for policy. See Kaplow, *Externalities*, *supra* note 74, at 489, 503; see also Christopher Curran, *Optimal Techniques of Redistribution*, in VI *ENCYCLOPEDIA OF LAW AND ECONOMICS* 301, 309 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (describing the work of K&S and others as "compris[ing] an existence theorem—if society decides to redistribute income, there exists a tax schedule for redistributing income that everyone prefers to any other way of redistributing income, including the use of legal rules or institutions").

176. See COASE, *supra* note 2, at 13 ("I examined what would happen in a world in which transaction costs were assumed to be zero . . . not to describe what life would be like in such a world but to provide a simple setting in which

tention to political action costs, not divert attention away from them with conjectures and assumptions.

### 1. Beyond Tautology

One argument for ignoring political action costs might be that they are simply inputs into, or artifacts of, the prevailing political equilibrium. On this account, they could not stand in the way of maximizing social welfare because they are part of what determines the shape of the social welfare function itself, and a background constraint against which its maximization plays out.<sup>177</sup> Suppose, for example, that distributive patterns become vastly less egalitarian following changes in earning patterns that are not counteracted to any significant degree by changes in the tax system.<sup>178</sup> This distributive result might be interpreted not as the product of a political impediment to the achievement of some stable preexisting social welfare function, but rather as the welfare-maximizing outcome under the new political equilibrium produced by these new earning patterns. So whatever the distribution was in 1990 was just the distribution that political equilibrium then allowed. Whatever the distribution is in 2015 is just what the political equilibrium now allows.

Significantly, however, our analysis suggests that there is no unique distributive outcome that the political system produces under a given set of conditions; rather, political action

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to develop the analysis and, what was even more important, to make clear the fundamental role which transaction costs do, and should, play in the fashioning of the institutions which make up the economic system.”).

177. An analogous point has appeared in the transaction costs literature: transaction costs can never interfere with efficiency because they are simply additional constraints, like the costs of transportation or technological limits, that form the background conditions under which optimization takes place. See Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1212, 1218–19 (1991); Harold Demsetz, *The Problem of Social Cost: What Problem? A Critique of the Reasoning of A.C. Pigou and R.H. Coase*, 7 REV. L. & ECON. 1, 7 (2011). If a transaction would cost too much, it is efficient that it not occur, just as a shipment should not occur if it costs more than it is worth. See Demsetz, *supra*. This might seem to suggest a tautology that always treats the status quo as optimal. See Dahlman, *supra* note 92, at 153–54. See generally E.J. Mishan, *Pangloss on Pollution*, 73 SWEDISH J. ECON. 113 (1971). But when costs are amenable to cost-effective reduction or elimination through changes in legal rules or institutions they are an appropriate focus of attention for law and economics scholars. See Calabresi, *supra*, at 1231–35; Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1481–82 (2013). This is true of political action costs no less than transaction costs.

178. See *supra* note 85 and accompanying text.

costs are variable and malleable across methods and modes of distribution. Just as transaction costs can be higher or lower depending on institutional design, the political action costs of achieving a given distributive result can be higher or lower depending on the route employed. Those differences in political action costs translate into differences in achievable distributive results, with implications for social welfare. Of course, one might attempt to define social welfare in a way that tautologically equates its maximization with whatever distributive results are actually obtained through one's preferred distributive route.<sup>179</sup> Accepting this tautology would effectively foreclose distributive considerations altogether, without quite saying one is doing so. This, we think, is an insupportable position for a welfarist to take.

Confronting distributive variance admittedly introduces many complications—starting with the contested question of what social welfare function to maximize. The invariance hypothesis, if true, would make such inquiries unnecessary. Comparing the welfare generated by two (or more) different distributive results is obviously a much less tractable task than simply examining which of two routes to an invariant distributive result is less costly. Yet because invariance cannot be made true without resort to tautology, it cannot be invoked to push distributive considerations out of the welfarist analysis of legal rules and policies. Law and economics scholars should not, of course, feel compelled to take up distributive questions if they would prefer to focus solely on questions of economic efficiency. But they should be clear about what they are—and are not—doing.

## 2. Communicating and Collaborating

Consistent with the discussion above, we propose a change in the way that law and economics speaks to those who care about distribution and who believe that our current distributive pattern diverges from what would maximize welfare. Currently

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179. Alternatively, one might take the position that social welfare is always maximized regardless of which distributive route is taken and which distributive result is reached. Here, the choice of route might itself be viewed as just another input into the political equilibrium that generates the relevant social welfare function. We do not dispute that redistributive efforts can have the effect of altering the political equilibrium. *See* Markovits, *supra* note 5, at 600–01; McDonnell, *supra* note 5, at 111. What we are questioning is whether any realistic social welfare function can be understood to be satisfied regardless of which political equilibrium obtains and which distributive outcome is produced.

the standard message transmitted from law and economics is this:

*Standard Message.* You care about distribution? Hey, we care about distribution too! We're welfarists and we fully recognize that maximizing social welfare requires getting distribution right. But we want to make sure that we redistribute in the least costly way. Otherwise, you might think you are helping some group, say the poor, but you are really hurting them by redistributing in an inefficient way. Making legal rules sensitive to distribution is a very expensive way to redistribute because it adds unnecessary behavioral distortions. There is a better way. Tax-and-transfer will get you to your distributive goal (whatever it may be) more cheaply than whatever other plan you may have in mind. The pie can be bigger, and everyone can have a bigger slice.

*Standard Message* sounds ecumenical and open to all distributive approaches. But, as we have seen, the invariance hypothesis upon which it is implicitly based does not hold water. It can only be shored up by adopting a vision of welfare maximization that aligns with whatever moment-to-moment distributive outcome is actually produced by the political system—a kind of Panglossian social welfare function.<sup>180</sup> People who employ less tautological measures of distributive optimality would find it highly relevant that *different* distributive results are possible depending on the distributive method selected. Such individuals might well be interested in quantifying these distributive differences and considering how they might trade off against efficiency considerations. *Standard Message* closes off these lines of inquiry.

In place of *Standard Message*, we argue, law and economics scholars should be sending one of the following two messages.

*Honest Disregard.* So you are raising a distributive issue. I think that whatever distribution our political equilibrium produces through the tax-and-transfer system at any given time is probably the right one, or at least that we can't do any better at that point in time. If

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180. In Voltaire's *Candide*, Dr. Pangloss declared the existing state of affairs to be the "best of all possible worlds." VOLTAIRE, *CANDIDE* 2 (Burton Raffel trans., 2005).



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you agree with that, then I can tell you categorically that we should focus only on efficiency in crafting legal rules, and just let the political process do whatever it does in setting tax-and-transfer policy. If you have some other idea about what welfare maximization requires in terms of distribution, and you don't trust the political process to get us there, then I can't really say anything to you about that. My work focuses on efficiency, not distribution or politics.

*Collaboration.* So you are raising a distributive issue. There are many different views about what distribution we should pursue as a society, which is to say that there are many ways our social welfare function could be formulated. But if you tell me that, based on your vision of welfarism, you'd like to see more (less) redistribution in favor of the poor, there are a couple things I can say about that. Right off the bat, there is always an advantage to a tax-and-transfer system because it only distorts the labor-leisure decision, and doesn't distort any other decisions. However, the political action required to redistribute involves costs, and it's possible those costs may be greater in the tax-and-transfer realm under some circumstances. That could potentially tip the balance and cause other kinds of distributive changes to dominate.

The first, *Honest Disregard*, makes clear that the speaker is not interested in exploring distributive issues. Consistent with that position, it declines to give advice about how to achieve a different distribution. The second, *Collaboration*, seeks to invest intellectual effort in showing how someone with a particular distributive objective would go about achieving that goal using available legal tools. Part of the analysis would track the standard discussions we are critiquing, but, importantly, part of the analysis would take into account the role of political action costs. In the spirit of *Collaboration*, then, those concerned about distribution might be told that a given legal rule produces change X in distribution but also causes an efficiency loss of Y magnitude, leaving it to those who construct and apply social welfare functions to assess if this is a worthwhile trade.

## B. DOCTRINAL REDISTRIBUTION PLAUSIBLY INCREASES SOCIAL WELFARE

Distributive variance opens up the possibility that a non-tax method of redistribution that makes possible a preferred distributive result will advance welfare on net, despite introducing other distortions. Conversely, an efficient legal rule may produce an enduring distributive deficit that is more costly in welfare terms than a less efficient rule that generates better distribution. We do not claim that doctrinal redistribution will always, or even very frequently, dominate tax-and-transfer—only that it may plausibly do so under some circumstances, and that this possibility warrants investigation. This Section examines some dimensions of that inquiry.

### 1. Burdens of Proof

A pivotal (if often unstated) premise in most debates about tax superiority concerns who should bear the burden of proof.<sup>181</sup> Our view is that the individuals who would give categorical and counterintuitive advice—that, outside of tax, welfarists should ignore the welfare effects of distribution—bear the burden of proving the advice is well-founded. Given the falsity of invariance, that burden has not been met, at least not as a categorical matter.

At the same time, those who seek to justify *particular* inefficient doctrines on the basis of distribution should, at a minimum, bear the burden of showing that the doctrine itself plausibly changes distribution in a way that is likely to produce welfare gains.<sup>182</sup> This is a minimum condition for setting up the possibility that such welfare gains could swamp efficiency losses. That further showing—that welfare gains exceed welfare losses—depends on how heavily different distributive results

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181. K&S have previously asserted that the burden must fall on those who would challenge tax superiority. See Kaplow & Shavell, *Legal Rules*, *supra* note 15, at 835 (“[A]lthough one or another qualification may turn out to be relevant in some instances, we would need to have sufficient evidence (or, at minimum, plausible conjectures) in order to know what, if any, adjustments to legal rules should be made.”); Markovits, *supra* note 5, at 523, 610 (noting and critiquing this assignment of the burden of proof).

182. As we have seen, the contracting-around argument suggests some purportedly redistributive legal rules are no such thing, and this is an excellent reason not to pursue such rules (ones that stand no chance of changing distribution in a welfare-enhancing direction). See *supra* notes 34–35 and accompanying text. Neither proponents nor opponents of redistributive social policies or legal rules should be relieved of the duty to investigate their actual incidence.

are weighted within the social welfare function under consideration.

The net effect on welfare also depends on the extent to which distributive changes achieved doctrinally will be countermanded by other legal actors or will merely duplicate results that would have otherwise been achieved through tax-and-transfer. Our discussion above rebuts the strongest version of this claim—complete invariance—but, as the next section explains, even partial offsetting and crowding out can remain costly. Here, it seems as if those debating the merits of different forms of distribution should share the burden of investigating these dynamics.

## 2. Costly Offsetting and Crowding Out

The existence of distributive variance does not mean that doctrinal redistribution is never offset to any degree. Nor does distributive variance rule out the possibility that redistributive legal rules will at times partially or wholly crowd out less distortive tax-and-transfer measures. Both offsetting and crowding out can be very costly. These costs may be worth incurring, depending on how the final distributive and allocative results compare with those that would have obtained in the absence of the initial act of doctrinal redistribution, but they should be taken into account. Although we will focus in this Section on the possibility that Congress will offset the distributive impacts of court-enacted legal rules, the analysis applies more broadly to all sorts of offsetting that might occur as between different governmental actors, such as between Congress and a state legislature, between two different courts, between a court and an administrative agency, or between two different administrative agencies.

As an initial matter, it bears emphasis that offsetting may be entirely absent in some settings. It may simply be implausible that certain narrow legal rules or local policies will attract distributive countermands from anyone. Similarly, when an actor's opportunities to redistribute are sufficiently limited, she may be able to take advantage of all of those opportunities without ever producing the sort of aggregate distributive blip necessary to attract political attention or galvanize a countermand. In other words, as we discussed above, the Margin of Inaction (MOI) may be larger than the full set of plausible redistributive opportunities. Legal actors such as courts may also be confronted with circumstances in which it appears unlikely

that making a distributive improvement or avoiding a distributive deficit will crowd out similar moves by Congress. In these cases, the welfarist advice might well be the opposite of that given by K&S: instead of always ignoring distribution, these actors should always take it into account in their decisionmaking.<sup>183</sup>

Significantly, the MOI is a double-edged sword that can also keep Congress from making welfare-advancing *corrective* distributive offsets. Thus welfarist courts may decline to adopt distributively harmful efficient legal rules when they predict that Congress would be unlikely to provide a correction.<sup>184</sup> Moreover, the effective MOI encountered by a court could grow if background social and economic factors move distribution in, say, an even more inegalitarian direction than Congress itself would prefer.<sup>185</sup> Under some social and economic conditions, courts may be in a position to both respond to inegalitarian shifts that fly under Congress's radar and (if the court's preferences are yet more egalitarian than Congress's) to overcorrect for them to an extent that Congress will not counteract.<sup>186</sup>

Things become more complicated if the power of courts to effect welfare-enhancing distributive changes outstrips the MOI; in this case, taking every opportunity to move distribu-

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183. This assumes there are not other institutional or process reasons to keep redistribution out of the hands of courts. *See infra* Part III.B.3.

184. It is noteworthy that courts have at times been deemed especially well-suited to assess the political power of the litigants and the likelihood that they will be able to achieve their goals politically. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (posing the question of “whether prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry”). Thus, courts may have particular institutional competence in recognizing when corrective offsetting will and will not occur, and in determining the circumstances under which legal rules can improve the position of the politically powerless without drawing legislative countermands. We thank Tara Grove for comments on this point.

185. *See generally* THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014) (chronicling distributive shifts over time).

186. There is still a potential crowding out concern in these contexts—it is possible that if every welfarist court hewed to efficiency as the distributive picture got cumulatively worse that eventually Congress would react to improve distribution. But it is also possible that the deteriorating distributive picture would be accompanied by shifts in the political equilibrium that would entrench the rising inequality. The result could be a sort of “ratchet effect” in which growing inequality begets even more inequality. *See Orbach, supra* note 91, at 55 (rent-seeking causes inequality with growing effectiveness as talent is drawn into areas of the economy where rent-seeking is possible).

tion in a welfare-enhancing direction will cause some or all such efforts to be counteracted by Congress.<sup>187</sup>

Such offsetting can be quite costly. Aside from the resources consumed in carrying out move and countermove, the net effect is to leave in place distortionary legal rules that no longer produce countervailing distributive gains. Offsets may also produce objectionable distributive effects *within* income classes. A doctrinal legal rule that aspires to improve distribution will primarily benefit the particular low-income people who happen to be involved in particular transactions, activities, or legal disputes, not poor people in general.<sup>188</sup> But a tax-and-transfer offset that applies broadly across income classes will not surgically undo the attempted distributive improvement; rather, it will undo it on average for the income class. In this scenario, every gain for a low-income individual who benefits from an (ostensibly) redistributive legal rule translates into a direct loss for other low-income individuals who did not happen to benefit from the redistributive legal rule.<sup>189</sup>

Yet the fact that costly offsetting can occur hardly proves that the right amount of redistribution for welfarist courts to pursue is zero. If additional redistribution would enhance welfare, one wants to redistribute as much as the MOI allows, but

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187. An interesting question is what happens when the MOI is exceeded. One possibility is that the marginal judicial decision that increases redistribution beyond the MOI acts as a tipping point, causing Congress to undo the distributive effects of that and all prior judicial decisions moving distribution beyond Congress's preferred point. Alternatively, Congress may engage in partial offsetting by targeting the largest or most salient changes, while leaving some sub-MOI redistribution intact. It is also quite unclear whether and how the individual actions of different courts might aggregate to prompt congressional action, especially given the possibility that different decisions may have offsetting or synergistic distributive effects.

188. This is the haphazardness objection. *See supra* notes 36, 38–40 and accompanying text.

189. The normative valence of such a distributive result depends on the extent to which income serves as a better basis for welfare-improving redistribution than the trigger condition for benefiting from the legal rule. There is also a converse scenario that must be considered alongside the one in the text. Suppose a court chooses an efficient rule with bad distributive results for those who happen to be engaged in particular interactions. If Congress then engages in a corrective offset using tax-and-transfer, it will make everyone in the income class better off but will leave those who suffered distributive losses in the particular interaction relatively worse off. In other words, this particular drawback of offsetting—that it alters the intra-class distribution—applies whether we are talking about offsetting of aspirational changes (which would not be necessary if we followed K&S's advice) or corrective offsetting of unwanted distributive effects of newly adopted, efficient rules (which would be required if we followed K&S's advice).

no more. Similarly, welfarist courts would want to stop redistributing before their efforts start to crowd out measures that Congress would otherwise enact (at lower distortionary cost).<sup>190</sup> To the extent that Congress reacts to aggregations of distributive changes, courts may face an interesting collective action problem. Their success in resolving it depends not only on their ability to coordinate, but also on their ability to gauge how close they are to inducing Congress to alter the progressivity of the income tax. Although the question is an empirical one, the idea that judges are capable of such discernment is not implausible. Strategic theories of statutory interpretation are premised on the analogous idea that judges understand how far an interpretation of a statute can diverge from what the current legislature wants.<sup>191</sup>

### 3. Alternative Objections: Institutional and Process Concerns

The fact that invariance is false means that multiple distributive equilibria are possible within our political system. This result raises questions—ones that are suppressed when invariance is assumed—about whether there are reasons to prefer one redistributive institution or process over another, independent of the merits of the distributive outcome itself and the distortions associated with it. To a large degree, these questions fall outside the scope of this Article. Our primary purpose is to highlight and criticize the invariance assumption that has played such a large and unacknowledged role in the way legal economists treat distributional issues. Thus, even if institutional or process considerations weigh against doctrinal redistribution, that does not justify using the existing analysis to support tax superiority. Nonetheless, we will briefly consider how such considerations might affect the welfare analysis.

First, perhaps there is a normative objection to engaging in redistribution through institutions other than the legislature. At one point K&S come close to claiming that the legislature is institutionally superior, compared to courts, for effecting redistribution in a democracy.<sup>192</sup> Such a claim has real bite when

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190. The costs of crowding out follow from K&S's extra distortion argument; one is substituting a more distortionary process for a less distortionary one. Consequently, the degree of harm caused by crowding out depends on the validity of the extra distortion argument itself. See *supra* notes 26–28 and accompanying text.

191. See *supra* note 102 and accompanying text.

192. See Kaplow & Shavell, *Less Efficient*, *supra* note 15, at 675; see also Weisbach, *Distributionally Weighted Cost-Benefit Analysis*, *supra* note 36, at

institutional variance exists, because different institutional actors are capable of delivering different distributive outcomes. A welfarist would presumably approach the question by considering both the content of the distributive result available through each alternative avenue and the welfare implications of using that particular avenue—whether administrative costs, costs relating to preferences of the citizenry for particular processes, or otherwise. This calls for comparative institutional analysis capable of capturing all the differences between the distributive routes. We see nothing obvious about the result of this analysis.

Specifically, we do not see why a theorist would categorically endorse courts, for example, to conduct efficiency analysis, but categorically object on welfare grounds to their conducting distributive analysis. Efficiency analysis is just as complex and contested as distributive analysis, and most judges lack formal economic training.<sup>193</sup> Moreover, a court's single-minded pursuit of efficiency in a situated legal context is subject to second-best critiques that seem at least as significant as those that might arise from its efforts to pursue both efficiency and distribution in that same context.<sup>194</sup> Finally, even if a welfarist were to rule out redistribution by courts based on such considerations, other non-tax alternatives would remain open, such as redistributive legal rules enacted by legislatures.

A second objection might be that the doctrinal redistribution is inherently (or at least typically) lacking in transparency. Perhaps the reason for variance is only that the public will fail to recognize some forms of redistribution for what they are and perhaps tax progressivity has the virtue of making redistribution plain and visible. Our discussion of salience and framing might imply that we favor redistributive methods that trick the public into providing support. To be sure, there are difficult

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176 (suggesting, in contesting distributionally weighted cost-benefit analysis, that “[t]he normal course for Western democracies is for elected legislatures to be allocated the power to make the primary distributive judgments”).

193. Interestingly, law and economics has not always viewed courts as especially well-suited to perform economic analysis. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 323 (1995) (“Most early proponents of law and economics were insistent that the legislature alone was the appropriate forum for formulating and implementing economic policy.”); *id.* at 324 (“[I]n much of this [early law and economics] literature we encounter a deep distrust of the perceived economic perspective of the courts, and a gargantuan faith in the economic good sense of the legislature.”).

194. See R.G. Lipsey & R.K. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956); Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3 (1998).

normative questions that attend any discussion about shaping public perceptions surrounding redistribution (or efficiency, for that matter). For one thing, failures of transparency can backfire, heightening political action costs or producing other direct welfare losses—losses that must be balanced against whatever expected distributive gains might thereby be achieved.<sup>195</sup> Again, however, we see nothing obvious about how a welfarist analysis would treat these issues.

Significantly, there is no natural “manipulation-free” baseline that obviously and uncontroversially reveals the full truth of a distributive situation.<sup>196</sup> One might say that framing redistribution to highlight features like shared contributions to a common goal, reciprocal social insurance, the bundling of costs and benefits, or the correction of unfair background conditions is a “manipulation.” But the same might be said of a system that delivers pre-tax earnings to individuals without making transparent the ways in which the earning of that income is itself dependent on public expenditures,<sup>197</sup> or of a tax code that embeds numerous tax breaks that would look offensive to fairness if cast as direct welfare payments.<sup>198</sup> If tax subsidies for parents of young children are the economic equivalent of tax penalties for the childless, yet the former is politically feasible while the latter is not, which policy is manipulative and which is transparent?<sup>199</sup>

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195. See Yew-Kwang Ng, *The Optimal Size of Public Spending and the Distortionary Cost of Taxation*, 53 NAT'L TAX J. 253, 257 (2000) (“While we may try to do good by stealth in the short run and proceed to use distributional weights, in the long run this will be known and cause disincentive effects.”). On the other hand, overt redistributive efforts carry the risk that their very explicitness will lead to political malfunctions. See FRIEDMAN, *supra* note 131, at 194 (observing that a negative income tax, in which money transparently flows from one group to another, creates “the danger that instead of being an arrangement under which the great majority tax themselves willingly to help an unfortunate minority, it will be converted into one under which a majority imposes taxes for its own benefit on an unwilling minority”). Although Friedman viewed this danger as elevated by the fact that the approach “makes the process so explicit,” he concluded that one must simply “rely on the self-restraint and goodwill of the electorate.” *Id.*

196. Cf. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 237–38 (2008) (discussing the inevitability of choosing a default).

197. See MURPHY & NAGEL, *supra* note 58; Gamage & Shanske, *supra* note 131.

198. See *supra* note 136 and accompanying text.

199. See *supra* note 135 and accompanying text (presenting the related Schelling paradox).



These baseline issues are exacerbated by an underappreciated feature of the principle of prescriptive tax superiority: that it not only directs courts and other actors to refrain from adopting doctrines that would improve distribution, it also directs them to undertake efficient acts that would *worsen* distribution.<sup>200</sup> Yet we would not ordinarily think of a legal rule that merely maintained the distributive status quo as “redistributive” in nature.<sup>201</sup> In what sense is it more transparent to generate distributive neutrality through a two-step process in which distribution is first worsened (offstage) and then brought back to baseline through an overtly redistributive process that attracts significant political resistance?<sup>202</sup> As recent research suggests, the fact that a policy generates political resistance does not mean that it also generates an accurate understanding of the incidence of the relevant burdens.<sup>203</sup> There is no obvious welfare-related reason to categorically prefer processes that make preferred distributive patterns maximally difficult to achieve and maintain.<sup>204</sup>

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200. See *supra* notes 79–80 and accompanying text (distinguishing corrective invariance from aspirational invariance).

201. See *supra* note 58 (discussing the meaning of redistribution).

202. Experimental evidence suggests that people cannot readily aggregate “on stage” and “offstage” distributive elements when making normative judgments. See McCaffery & Baron, *supra* note 134, at 1768 (“Counter to logic, the disaggregation bias suggests that ordinary people will have a difficult time accepting a steeply progressive tax system, even if it is simply to compensate for other relatively regressive elements of public finance that are offstage.”). The possibility that existing legal rules developed in ways that deliberately built in regressive redistribution—perhaps in part to avoid the transparency associated with the tax system—sharpens this point. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, 100–01 (1977) (suggesting that antebellum politicians likely chose to use legal doctrine rather than the tax system to pursue subsidization at least in part because the former “can more easily disguise underlying political choices,” and noting that “the tendency of subsidy through legal change during this period was dramatically to throw the burden of economic development on the weakest and least active elements in the population”).

203. See Eric J. Brunner et al., *Homeowners, Renters and the Political Economy of Property Taxation*, 53 REGIONAL SCI. & URB. ECON. 38, 48 (2015) (finding, using survey data of California homeowner and renter attitudes toward sales and property taxes, “that the strong opposition among homeowners to the property tax is present regardless of the relative tax burden faced by the individual homeowner” and concluding these results are most plausibly due to the relatively greater salience of the property tax). Brunner et al. observe that “[w]hile salience is clearly associated with greater sensitivity to tax rates, such sensitivity is clearly no guarantee that taxpayers rationally consider their personal tax burden or effective tax price of public services when making choices concerning public service spending.” *Id.* at 48–49.

204. On the contrary, a welfarist would presumably use welfarist criteria to

More broadly, welfarists cannot avoid confronting the fact that most voters are not committed welfarists. Instead, voters are more likely to combine a pragmatic concern for consequences with intuitive concerns for non-consequential values like fairness, corrective justice, equality, and political legitimacy. Thus, it is not enough for a welfarist to find a policy vehicle for redistribution that satisfies purely welfarist criteria; a committed welfarist must also find a political vehicle that aligns or resonates with broadly shared forms of normative thinking to which the public subscribes. That linkage is what is required to maximize welfare. It is not clear what the welfarist objection could be to this approach, especially given that other popular beliefs—such as those regarding the connection between effort and economic success—already form part of the backdrop against which redistributive efforts play out.<sup>205</sup>

### C. FURTHER RESEARCH INTO POLITICAL ACTION COSTS

Part II surveyed a number of reasons why political action costs might be positive and variable, thus falsifying the invariance hypothesis. Each of the reasons for doubt about invariance represents an area of existing or potential research into the relative magnitude of political action costs, and hence the likely feasibility and stickiness of distributive changes. In this Section, we will briefly consider some directions that future research might take in light of the analysis above.

#### 1. Assessing Inputs

Welfarists should be interested in examining the inputs into the magnitude of political action costs. These factors will help to determine the amount of redistribution that may be uniquely achievable outside of the tax system. As in other contexts, our concern should be with identifying regularities (here, in mediating political resistance and acceptance) that are systematic enough to facilitate predictions about how the costs of political action will be affected.

To focus on just one example, fairness perceptions and preferences follow discernible patterns that can be, and have

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assess the relative merits of different approaches rather than ruling out categories of acts based on criteria like transparency. *See, e.g.*, Eric A. Posner, *The Law, Economics, and Psychology of Manipulation* (Univ. of Chi. Coase-Sandor Inst. for Law & Econ. Working Paper No. 726, 2015), <http://ssrn.com/abstract=2617481> (arguing that welfarist criteria should be used to assess manipulative acts undertaken by government in pursuit of public ends).

205. *See supra* notes 149–50 and accompanying text.

been, uncovered through experimental work.<sup>206</sup> If understandings of fairness did not exhibit any regularities, and instead represented random and highly idiosyncratic reactions to different situational features, then it would not be possible to say anything predictive about how fairness perceptions would impact relative political action costs in different contexts.<sup>207</sup> As it is, fairness research provides reason to believe that redistribution (including cross-subsidies) embedded in legal rules outside of the tax-and-transfer system—that is, redistribution that does not advertise itself as such but instead operates within rubrics like the granting of entitlements or the correction of injustice—will be easier to carry out and harder to countermand. Those interested in *Collaboration* will at least want to investigate this prediction.

Similarly, cognitive features and biases, as well as determinants of tax salience, operate in predictable ways. Other regularities might be uncovered surrounding the operation of legislative inertia in response to different types, sources, or magnitudes of distributive changes. Welfarists should be interested in all of these lines of inquiry. By understanding such components of political action costs, it may become possible to formulate policies that can achieve more redistribution, or that can achieve the same amount of redistribution more cheaply.

## 2. Assessing Outputs

Attending to political action costs can also change the way existing law, policies, and institutions are assessed. The principle of tax superiority is so well accepted that it sometimes permeates positive political analysis. For example, in a conversation with legal colleagues, the positive question was posed: given that peak-load or congestion pricing is efficient, why don't we see more of such pricing of road use in the center of major cities, as we observe in London? One of us speculated as follows: because the poor, and those concerned with the welfare of the poor, oppose the distributional effects of charging the poor to use the roads. Given the K&S claim, the retort was obvious: The efficiency gains from congestion pricing of road use could

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206. See *supra* Part II.D.

207. An analogous point has been made in the context of behavioral law and economics. See, e.g., Jolls, *supra* note 26, at 1654 (explaining that behavioral law and economics “shares with [law and economics] the view that human behavior is organized by predictable patterns, which enable the analyst to generate models (often formal ones) and testable hypotheses about the effects of legal rules”).

be allocated to make the change distributionally neutral or even pro-poor, so the distributional effects cannot explain the policy's failure.<sup>208</sup>

Thus, the normative claim of tax superiority seems to support a claim of positive political theory: Because the ideal social planner can always improve the condition of the poor by (non-tax) legal rules that ignore distribution, one cannot explain the existence of inefficient legal rules by a political concern for the poor.<sup>209</sup> If one observes inefficient legal rules, then, there must be some other explanation apart from concern for distribution—presumably some political malfunction. Yet this line of analysis erroneously assumes invariance. Given varying political action costs, one plausible explanation for the existence of inefficient rules, to be explored with other plausible public choice theories, is that the inefficiency makes politically feasible more welfare-enhancing distribution than would otherwise be possible.<sup>210</sup>

Our discussion raises other areas for inquiry as well. Recall our previous distinction between “corrective invariance” and “aspirational invariance.” It is possible that adjustments in one direction or the other are more likely in Congress. For example, if redistribution in favor of the poor is understood to be more tightly capped by a political ceiling rather than supported by a political floor (or vice versa), then changes that make things worse (better) for the poor might escape correction to a greater extent than changes that make things better (worse) for the poor. The question merits empirical study. If corrective variance is much more significant than aspirational variance, for example, then it might be possible for courts to play a crucial role in distributive matters without ever undertaking to “redistribute” from the existing baseline.

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208. For discussion of distributive and political economy issues surrounding congestion pricing, see Jonathan Remy Nash, *Efficiency Versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 725–38 (2008).

209. This example shows how the principle of formal tax superiority (we could in theory do better by pursuing this distributive goal through tax) often blurs not only into prescriptive tax superiority but also a positive prediction that institutional actors will behave in accordance with that prescription.

210. See Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 354 (2013) (suggesting that economists miss the positive political explanations of the differential use of carrots and sticks, which depend on their distributional effects, because of the normative belief that taxes alone should determine distribution).

### 3. Pursuing Invariance?

As emphasized above, the prescriptive advice to ignore distributive considerations in formulating legal rules must be carefully distinguished from K&S's formal result.<sup>211</sup> That formal result demonstrates the theoretical superiority of the tax-and-transfer method for accomplishing a given quantum of redistribution, due to its being less distortionary. The empirical falsity of invariance, which goes to the political cost and hence feasibility of achieving particular redistributive goals through tax-and-transfer, does not undermine this claim of formal tax superiority. On the contrary, it raises the interesting question of how we might (and whether we should) shift more *actual* redistribution to the tax-and-transfer system.<sup>212</sup> Put a little differently, if we could do more to make invariance true, should we?

The answer for a welfarist would turn, of course, on whether welfare would thereby be advanced. But the problem is complicated by heterogeneity in redistributive preferences among various actors, who may subscribe to different social welfare functions that weight distribution very differently. Consider two different ways that invariance could be advanced as a positive matter. First, agencies, courts, and legislative bodies at all levels of government could be required to estimate the distributive impacts of their every act and report this to Congress, to facilitate distributive offsetting through the tax system,<sup>213</sup> and Congress could adopt the practice of offsetting the net effect of these changes annually.<sup>214</sup> Second, agencies, courts, and legislative bodies at all levels of government could condition their own forbearance in using their redistributive powers on Congress undertaking certain redistributive acts.<sup>215</sup>

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211. *See supra* Part I.A.

212. This point is tightly connected to the notion of a “political Coase Theorem.” *See supra* note 174.

213. Agencies are already asked to include “distributional effects” in their regulatory impact analyses. *See, e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER 7–8 (2011), [http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4\\_regulatory-impact-analysis-a-primer.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf).

214. An alternative would be for Congress to key its tax responses to changes in an objective benchmark, such as the Gini coefficient. *See* ROBERT J. SHILLER, THE NEW FINANCIAL ORDER 149–64 (2003) (discussing the possibility of conditioning tax rates on achievement of certain measures of after-tax income equality, to provide a form of societal “inequality insurance”).

215. *Cf. Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (2007) (enjoining enforcement of ordinance

Both approaches would be aimed at ensuring that whatever redistribution does occur (from a baseline of efficiency), occurs through tax and transfer. This would carry some welfare gains in reducing the behavioral distortions from redistributive legal rules, assuming for present purposes that K&S are correct in their extra distortion argument. But in the first case the distributive preferences of Congress would trump, while in the second the distributive preferences of the other bodies would trump. Variance is removed by allowing one distributive result to dominate; whether this advances or reduces welfare depends on one's social welfare function.

This thought experiment—making invariance true—brings us full circle. A redistributive mechanism's relative merits *as a redistributive mechanism* cannot be evaluated independent of the distribution that it will be used to carry out. Efforts to channel all redistribution into the least distortionary mechanism (whether by institutional reform or academic argument) cannot be supported solely by reference to it being the least distortionary mechanism. The invariance hypothesis tells us we can do no better in distributive terms elsewhere because, in effect, there is no elsewhere. Once we recognize that political action costs drive a wedge between the distributive results that other actors and bodies can achieve and the distributive preferences Congress instantiates through its tax and transfer policy, though, we cannot avoid the difficult normative questions about which distributive preferences—and whose—should take precedence.

### CONCLUSION

If transaction costs were zero, we could select legal rules based solely on their welfare-advancing distributive properties and still reach an efficient outcome in every instance. Transaction costs, then, explain the insistence on efficient rules that drives the principle of tax superiority. But prescriptive tax superiority also depends on an assumption about another impediment to welfare maximization: that the political action costs necessary to achieve a desired distributive effect will never be larger for taxes than they are for doctrinal rules. This assumption, in turn, underpins the invariance hypothesis that we have

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against sitting, lying, or sleeping in public streets or sidewalks unless enough shelter beds are provided); *supra* note 159 and accompanying text (discussing "trade adjustment assistance" programs that compensate those who lose out from free trade agreements).

criticized here. In fact, the costs of redistribution can vary across redistributive contexts in ways that make some distributive patterns impossible to achieve and maintain through tax alone. This distributive variance carries profound implications for the pursuit of social welfare, ones that welfarists should be interested in tracing.

Clearing away the assumption of distributive invariance upon which the principle of prescriptive tax superiority is founded opens up new avenues of research for law and economics scholars. In addition to providing a reason why distributive goals might at times be better pursued through legal rules than through tax mechanisms, our analysis invites inquiry into the factors that influence the magnitude and operation of political action costs. Incorporating these elements into the analysis is admittedly messy; it upends the tidy division of labor that the invariance hypothesis supports.<sup>216</sup> But as Nobel Laureate James Heckman has recognized, law and economics is “analytically incomplete” without “a satisfactory framework within which to analyze redistribution.”<sup>217</sup> In his words, “A fully satisfactory analysis would require a careful accounting of the politics of redistribution and the gap between ideal policies and those that are actually used by governments as they emerge from political compromises.”<sup>218</sup> We agree.

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216. Cf. COASE, *supra* note 2, at 15 (“The world of zero transaction costs, to which the Coase Theorem applies, is the world of modern economic analysis, and economists therefore feel quite comfortable handling the intellectual problems it poses, remote from the real world though they may be.”).

217. Heckman, *supra* note 59, at 332.

218. *Id.*