TAX FAIRNESS BY CONVENTION: A DEFENSE OF HORIZONTAL EQUITY

Ira K. Lindsay
ARTICLE

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TAX FAIRNESS BY CONVENTION: A DEFENSE OF HORIZONTAL EQUITY

By

Ira K. Lindsay*

ABSTRACT

Horizontal equity is the principle that people who earn equal income should owe equal tax. It has gotten a bad name. Although horizontal equity remains a textbook criterion of tax fairness, scholarly literature is largely hostile. Scholars ranging from the legal theorist Louis Kaplow to philosophers Thomas Nagel and Liam Murphy question its conceptual coherence and normative significance. The crux of the case against horizontal equity is that it seems irrational to worry about the relationship between pre-tax income and tax obligations rather than determining tax policy in light of what our best theory of distributive justice tells us is the best post-tax outcome. I argue that horizontal equity is best understood as a compromise principle for people who disagree about deeper principles of distributive justice. The debate over horizontal equity reflects two distinct ways of thinking about fairness. One approach starts with principles that specify a just distribution of income, resources or utility and uses these principles to derive appropriate tax laws. A second approach analyzes fairness norms as stable and mutually advantageous compromises between people who

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have conflicting interests and differing moral commitments. Proponents and opponents of redistributive taxation can agree that at any given level of redistribution they will each be better off if taxes are horizontally equitable. Horizontally equitable taxation can thus prevent rent-seeking and ideological conflict over tax policy from generating a wasteful patchwork of narrow taxes and tax subsidies. Observing horizontal equity may be unimportant when people agree on ideal principles of justice and the relevant empirical facts. But under more usual conditions of deep moral and empirical disagreement over tax policy, treating pre-tax income as a normative baseline can prevent conflict over distributive questions from leading to wasteful and inequitable tax policy.

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### I. INTRODUCTION

Horizontal equity has a peculiar status. Although horizontal equity is a textbook criterion of tax fairness,\(^1\) in the years since Louis Kaplow and Richard Musgrave’s debate over horizontal equity,\(^2\) the weight of scholarly opinion seems squarely against it.\(^3\) Horizontal equity is the principle that


\(^3\) E.g., Kaplow, Horizontal Equity Measures, supra note 2, at 139–50; see also James Repetti & Diane Ring, Horizontal Equity Revisited, 13 FLA. TAX REV. 135,
taxpayers who are positioned identically relative to the tax base should pay equal tax. For example, under an income tax regime, if A and B have the same income they should owe the same amount of tax. Vertical equity concerns the way in which tax obligations vary in proportion to income. As a corollary to my case for horizontal equity, I will defend a minimalist principle of vertical equity that requires only that taxpayers with higher income should owe more tax in absolute terms than taxpayers with lower income such that if A has a greater income than B, A will owe more income tax than B. Horizontal equity has a peculiar status. It is an intuitively appealing principle and, despite the weight of recent criticism, still figures prominently in discussions about public


4. The terms horizontal equity and vertical equity were coined by Richard Musgrave over half a century ago. See Richard A. Musgrave, The Theory of Public Finance: A Study in Public Economy 159 (1959). I explain horizontal equity and vertical equity in the context of income taxation for ease of exposition. A more precise formulation would describe horizontal equity in terms of equal treatment of individuals who are identically positioned relative to the tax base. The tax base might be specified in terms of wealth or consumption rather than income. Horizontal equity under a consumption tax regime would require that taxpayers with equal levels of consumption owe equal tax and under a wealth tax would require that taxpayers with equal wealth holdings owe equal amounts of tax. Alternately, one might define horizontal equity in terms of utility such that a horizontally equitable tax leaves individuals with equal pre-tax utility with equal post-tax utility. See Martin Feldstein, Compensation in Tax Reform, 29 Nat’l Tax J. 123, 124 (1976) [hereinafter Feldstein, Compensation in Tax Reform].

5. This principle of vertical equity is quite permissive. It is compatible with progressive, proportionate or even regressive tax rates. It is only violated in situations in which Taxpayer A realizes more income than Taxpayer B, but B owes more in tax than A does. More stringent principles of vertical equity are possible as well. For example, one could require that wealthier taxpayers pay at least as high a percentage of their income in tax as poorer taxpayers do. Because I aim to show that principles of tax fairness can play a useful role in structuring bargains between people with differing views about distributive justice, I have chosen a principle of vertical equity designed to be as innocuous as possible. I do not mean to imply that more restrictive principles of vertical equity are not also justified. I take no position on that question.
Attention to horizontal equity is sometimes justified by the observation that, regardless of what the experts think, people do appear to care about it. Why they ought to do so is often left unaddressed. Tax theorists,

6. I will focus primarily on horizontal equity because this is the more difficult principle to justify. If my argument in favor of it succeeds, the same reasoning can be used to support the minimal principle of vertical equity. Other arguments, however, are required to justify more ambitious principles of vertical equity. These are less likely to depend on the sort of conventional fairness principles appealed to in this Article and thus the justification, if any, of more ambitious principles of vertical equity is beyond the scope of this Article.

7. For example, Emmanuel Saez recently responded to Greg Mankiew’s facetious proposal to tax height as a proxy for earning power by appealing to popular sentiment in favor of horizontal equity:

Concerns for horizontal equity impose constraints on the optimal tax problem. The public would not accept a tax on height because it would seem unfair to tax more a taller person than a shorter person with exactly the same economic means. However, the public fully accepts that taxes should be based on income, which measures economic welfare or need closely, with the idea that it is less painful for a rich person than for a poor person to give up $1. Therefore studying the constrained utilitarian problem using a tax based solely on income and not based on extraneous characteristics such as height makes the most sense and can usefully inform the tax policy debate. That’s what economists have done (including myself) since the famous contribution of James Mirrlees in 1971.

I’d recommend Greg develops a model explaining why people care about horizontal equity -- that’d be a useful contribution.


The principle of horizontal equity is not a mere abstraction of academic theory but a fundamental belief that is widely held and strongly felt. Many otherwise desirable tax reforms may never be enacted because doing so would violate this injunction that government action should not treat equals unequally. It is important therefore to seek ways to eliminate or reduces such horizontal inequities.

Feldstein, Compensation in Tax Reform, supra note 4, at 128.
economists, and political philosophers have put forward powerful arguments that the principle of horizontal equity is misconceived. Thomas Nagel and Liam Murphy contend that attention to horizontal equity is just one manifestation of what they call the “myth of ownership”—the view that pretax income is of independent normative significance.\(^9\) Louis Kaplow argues that it is unreasonable to set tax policy according to fairness principles such as horizontal equity since they are unjustified if they fail to maximize welfare, and beside the point if they do happen to coincide with welfare maximizing policies.\(^10\) The crux of the case against horizontal and vertical equity is that it seems irrational to worry about the relationship between pre-tax income and tax obligations rather than determining tax policy in light of what the best outcome is all things considered. For example, utilitarians argue that tax law should maximize aggregate welfare whereas Rawlsians believe that taxes should be set in accordance with the difference principle. On either theory, it is of no real significance whether taxes turn out to be horizontally or vertically equitable because how tax obligations compare to pre-tax income has no intrinsic significance.

In this Article, I will give a new account of why horizontal equity is important. In doing so, however, I will suggest that its role is orthogonal to utilitarian policy analysis of the sort preferred by Louis Kaplow and comprehensive theories of distributive justice of the sort defended by Murphy and Nagel. I argue that horizontal equity is best understood as a compromise principle for people who disagree about the justice of redistributive taxation. Horizontal equity requires a sort of procedural fairness in allocating obligations to contribute to public goods in accordance with pre-tax holdings. It is valuable because it serves to constrain parties who may wish to use the tax system to gain at the expense of their fellow citizens and limits the extent to which distributions of wealth that have been fixed by private law may be


Why should a one-util shortfall to individual I count more than some other one-util shortfall to the same individual I because the former is classified as one particular form of inequity? The literature does not attempt to answer this basic question or, relatedly, indicate why a distinct measure of horizontal inequality is required in the first instance.


\(^10\) Kaplow, Theory of Taxation and Public Economics, supra note 8, at 396–401.
unsettled by public law. Proponents and opponents of redistributive taxation can agree that at any given level of redistribution, they will each be better off if taxes are horizontally equitable. Tax equity norms can thus prevent conflict over tax policy from generating a wasteful patchwork of narrow taxes and tax subsidies. They also can structure tax reform bargains in which people with ideological disagreements agree to reduce tax rates while expanding the tax base.

Tax equity norms would be unnecessary if people agreed on principles of justice and the relevant empirical facts. This explains why scholars who offer comprehensive normative theories of taxation tend not to give tax equity principles a significant role in their systems. Their criticisms of horizontal equity are often convincing when considered in the context of a unified ideal theory of fair taxation. However, when there is moral and empirical disagreement over tax policy, horizontal equity has a valuable role to play. This account of tax equity illustrates the usefulness of conventional norms of fairness and explains the normative significance of pre-tax income in a way that does not rely upon “natural property rights” or pre-institutional moral desert.

I will first explain several powerful arguments against tax equity principles. Next, I distinguish several ways of thinking about distributive fairness. Whereas prominent critics embrace a top-down theory of distributive fairness that evaluates taxes insofar as they contribute to a fully specified system of distributive justice, a bottom-up approach to tax fairness starts with pre-tax entitlements and then applies fairness principles that can be agreed upon by people with a range of normative commitments. I use this conception of fairness to defend horizontal and vertical equity. Rather than being an ideal

11. The distinction between ideal and non-ideal theories of justice is the subject of a large and ever growing literature. The terms “ideal” and “non-ideal” are defined variously and sometimes inconsistently throughout it. For the purposes of this Article, I take John Rawls’s theory of justice to be a prototype of ideal theory and non-ideal theory to depart from it in two crucial respects. First, ideal theory is concerned with the principles of distributive justice that would be best to implement if people were able to agree on common principles of justice (or, alternatively, if supporters of the correct principles of distributive justice were able to impose them by fiat). Non-ideal theory, by contrast, is concerned with situations in which people disagree about principles of justice (e.g., some people are Rawlsian and others are neo-Lockeans) and political institutions are not necessarily regulated by a single united theory. Second, ideal theory supposes that people are usually motivated to comply with principles of justice whereas non-ideal theory does not assume that people are sufficiently motivated to comply with principles of justice merely by virtue of their moral correctness. This is not, of course, to say that people are never intrinsically motivated to act justly, but merely to expand the scope of motivational considerations that must be taken into account.
principle of tax justice, horizontal equity is a fairness norm useful for structuring compromises between people who disagree about ideal principles of tax justice or about the empirical consequences of tax policy. After outlining my positive case for tax equity, I respond to objections that tax equity principles are vacuous because they do not rule out any plausible policies or ineffectual because they make no practical difference.

II. THE CASE AGAINST TAX EQUITY

Liam Murphy and Thomas Nagel in *The Myth of Ownership* and Louis Kaplow in numerous articles over the past several decades advance related criticisms of horizontal equity from different normative perspectives. Murphy and Nagel argue that tax fairness principles such as horizontal and vertical equity are symptomatic of conceptual confusion about the relationship between property rights and tax obligations. They aim to refute what they call “everyday libertarianism”—the view that people have a prima facie moral claim to their pretax income and that justice in taxation should therefore be evaluated according to a baseline of pre-tax income or holdings. Murphy and Nagel argue that because market outcomes have no independent moral significance, there is no reason to evaluate taxes in relation to pretax income or wealth. Tax laws should instead be evaluated according to whether they bring about results sanctioned by our best theory of distributive justice. Property entitlements and associated tax obligations are just insofar as they are part of a system that achieves post-tax results endorsed by principles of justice and unjust insofar as they are not. Since post-tax outcomes are the appropriate objects of moral evaluation, evaluation of tax policies against a baseline of pre-tax holdings is misconceived in that it adopts a baseline that has no special normative status. For this reason, Murphy and Nagel reject the principle of horizontal equity as an empty formalism that distracts from the truly important questions of tax fairness. And they reject claims that “tax discrimination” as such can be unfair unless it is done on the basis of some independently problematic ground such as race, sex, religion, or national origin. So, for example, “[t]here would be nothing unfair . . . in a tax on chocolate ice cream but not on vanilla, though it would be arbitrary.” Nor is there anything unfair about similarly arbitrary deductions and tax credits. A just tax regime might end up being horizontally equitable. But, according to Murphy and Nagel, this would be mere coincidence: tax regimes are just insofar as they bring about post-tax distributions that are just. Whether these results bear any particular relation to pre-tax income is of no import.

12. MURPHY & NAGEL, MYTH OF OWNERSHIP, supra note 9, at 38–39.
13. *Id.* at 170–72.
14. *Id.* at 170.
Murphy and Nagel reason as follows: Property rights are conventional in the sense that they do not track pre-institutional moral rights. Principles of distributive justice determine which distributions of property are just and which are unjust. Each citizen’s access to and control over social resources is determined by the concurrent effect of rules of private law, taxation, and government spending. In a just political order, a citizen’s morally legitimate property claims are determined by the combined results of these policies. For this reason, it makes little sense to talk of just property laws or just tax laws or just transfer payments in isolation. Supporters of different theories of distributive justice will have different views on which systems of property rights, tax obligations, and government programs are just. Utilitarians will support rules that maximize aggregate welfare. Rawlsians support rules that maximize the “primary goods” available to the least advantaged segment of society. A wide range of other principles of distributive justice are possible as well. Because taxes are a necessary element of the system of rules that determines legitimate property entitlements, “there are no property rights antecedent to the tax structure.” A person’s moral entitlement to property under a fully specified legal regime depends both on her pre-tax holdings and on her tax obligations (as well as various other points of private and public law). Because a person is only morally entitled to their post-tax income under a just economic system and post-tax income depends on both private law and tax law, nobody has any moral claim to their pre-tax income. And because pre-tax income has no independent moral significance, there is no legitimate ground for complaints (outside of certain forms of invidious discrimination, for example, on grounds of race) that a particular tax improperly favors one group or another by treating those with similar pre-tax incomes differently. For this reason, criteria of tax fairness, such as horizontal and vertical equity, that use pre-tax income as a normative baseline are entirely vacuous.

Murphy and Nagel are egalitarians with views on distributive justice similar to, but not identical with, those of John Rawls. In any case, their approach to distributive justice is typical of contemporary post-Rawlsian political philosophy. They argue that the justification of rules of taxation is systemic in that it depends on the entire system of property entitlements and tax obligations and teleological in that it is based on the resulting pattern of post-tax income and not sensitive to the ways in which pre-tax income

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17. Murphy & Nagel, Myth of Ownership, supra note 9, at 74.
18. Murphy and Nagel do not commit themselves to particular principles of distributive justice in The Myth of Ownership and may not agree with each other about all of the particulars.
translates into post-tax income. The basic contours of their argument, however, should appeal to all those who do not endorse a fairly strong theory of natural rights according to which people have a pre-institutional moral entitlement to their property and income earned through their labor. It is an argument that might, with small modifications, be endorsed by utilitarians and others who disagree with Murphy and Nagel about the correct theory of distributive justice. As such it provides a particularly difficult challenge to tax equity.  

19. Natural rights theories of property might suggest that systemic justification of tax obligations is not necessary either because pre-tax income reflects property rights that are justified by moral desert or because the state has acquired a moral obligation to defend these rights when the property owner entered the social contract. I do not favor natural rights theories of property for reasons that are tangential to the focus of this Article. See Ira K. Lindsay, *Humean Property Theory: A Defense*, (working paper, 2015), http://ssrn.com/abstract=2635246 [hereinafter Lindsay, *Humean Property Theory*]. In any case, it is unclear whether a robust theory of natural property rights is enough to ground tax equity principles. The basic problem is that natural rights theorists must still provide an account of why we should apportion taxes according to property holdings and not, for example, according to benefits derived from government or some other standard. Property holdings might be a rough proxy for benefits under certain circumstances. But often they are not. See Barbara H. Fried, *Proportionate Taxation as a Fair Division of the Social Surplus: The Strange Career of an Idea*, 19 ECON. & PHIL. 211, 237 (2003) (exploring some of the difficulties with claims that justice requires proportionate taxation). Regardless of whether natural property rights provide other grounds for favoring tax equity principles, those who favor a natural rights account of property ownership might accept my argument for tax equity as a principled compromise between persons who embrace differing ideal theories of distributive justice.

20. Other commentators concur with Murphy and Nagel’s view that horizontal equity is a distraction from the real questions of horizontal and vertical equity. For example, after an extensive review of debates over horizontal equity, Repetti and Ring conclude that vertical equity and horizontal equity:

[A]re together a single concept which lacks normative content and is itself only a proxy for theories of distributive justice and morality. It is a detour in history that led us to frame the issues of equality and fairness in the tax system in the language of VE and HE — a path which has both masked the emptiness of the concepts and overemphasized the possibility of two, distinct fairness inquires. We have been side-tracked from our larger task of tackling our disagreements over the underlying questions of distributive justice and morality . . . .

Repetti & Ring, *Horizontal Equity Revisited*, supra note 3, at 155.
Although Murphy and Nagel favor egalitarian principles of distributive justice, an argument of similar form can be made by those who believe that tax laws should be arranged so as to maximize aggregate welfare or utility. From this perspective, horizontal and vertical equity are irrational metrics because tax rates should be set in whatever way maximizes welfare regardless of the implications for horizontal and vertical equity. Tax scholar Louis Kaplow makes an argument that has exactly this form. Kaplow advances a barrage of objections. First, he argues that proponents of horizontal equity have no principled way to decide how to measure horizontal equity. Economists have proposed various indices for measuring tax equity. Kaplow claims, however, that they have little basis for choosing one over another because they lack a compelling theory of why to care about horizontal equity in the first place. Treating all taxpayers equally sounds appealing at first blush, but on closer inspection it is surprisingly hard to give an account of what this requires. Does equal treatment require that everyone pay an equal proportion of income? Or that everyone makes an equivalent sacrifice in terms of the degree to which taxation reduces welfare? Or that those who receive equal benefits pay equal tax? There are many different policies that can make some claim to equal treatment. It is far from clear that horizontal equity as defined above is the most appealing of these. In any case, Kaplow is able to cast his own view in egalitarian terms since utilitarianism can be described as


23. Insofar as this criticism is addressed to those who construct tax equity metrics that compare tax burdens before and after a tax reform, it is consistent with my position in this Article. The conception of horizontal equity I defend uses pre-tax income as the normative baseline. Tax reforms that reduce the variance in tax burdens among persons with equivalent income count as more horizontally equitable on this theory even if they greatly disrupt the pre-reform pattern of tax burdens. This is a sensible entailment. After all, one possible motivation for tax reform is to achieve greater horizontal equity in the sense of greater alignment between pre-tax income and tax obligations and thus a less distortionary tax system.

24. Harvey Rosen has developed a model of horizontal equity that interprets horizontal equity as requiring equal sacrifice in terms of utility rather than equal tax payments. On this theory, a tax is horizontally equitable insofar as two people with equal pre-tax utility will have equal post-tax utilities. Harvey Rosen, An Approach to the Study of Income, Utility and Horizontal Equity, 92 Q.J.Econ. 307, 307–22 (1978). Rosen’s article uses a definition of horizontal equity proposed by Martin Feldstein. See Feldstein, Compensation in Tax Reform, supra note 4, at 124.
the principle of giving each person’s welfare equal weight in moral evaluation. This, it might be argued, is a way of expressing equal concern for every person. Kaplow’s approach has the advantage of evaluating equality at the level of objects of fundamental moral importance—welfare—rather than in terms of objects of only derivative importance—taxes. One might disagree with Kaplow’s choice of utilitarian moral principles, while agreeing with the force of his critique in this instance. Egalitarians such as Murphy and Nagel might think that Kaplow has chosen the wrong principle, but at least they can concur that “everyone’s welfare counts equally” is not a pointless formalism.

Second, once one settles on a normative baseline such as pre-tax income, there will be conflicts between welfare maximizing tax schemes and horizontal equity. A simple example involves two people with differing propensities to shift from labor to leisure in response to taxation. Suppose these two people have the same pre-tax earning potential, but have very different propensities to reduce earnings in response to the same tax rate. Taxing the less tax sensitive person (i.e., the person less likely to change behavior in response to taxation) at a higher rate than the more tax sensitive person will usually be more efficient because the state will be able to collect the same amount of revenue while causing less distortion in economic activity. Although most deviations from horizontal equity reduce aggregate welfare, there are many reasons that violations of horizontal equity could increase aggregate welfare in particular instances. Retreating from welfarist principles to Pareto analysis does not solve this problem. Kaplow and Shavell have shown that non-welfarist principles such as horizontal equity will disfavor Pareto improvements in some instances, at least when considering preferences under conditions of uncertainty about one’s future income.

Kaplow issues a challenge to proponents of horizontal equity. Either they must explain why horizontal equity should be preferred, at least sometimes, to welfare maximization or give up on deploying horizontal equity as a meaningful criterion of tax justice. The fact that horizontally equitable policies sometimes maximize welfare and are sometimes Pareto efficient is no consolation if defenders of horizontal equity have no argument for preferring...
it when tax equity and welfare maximization diverge. Appealing directly to welfare or Pareto efficiency simply concedes the field to supporters of welfare analysis by adopting welfare maximization as the fundamental normative criterion.

Horizontal inequity, Kaplow concedes, is sometimes a proxy for welfare reductions in the form of increased exposure to risk and sometimes a proxy for rent-seeking. More generally, taxing two people with the same income to different amounts of money is not efficient unless we have some reason to think that the two people differ in some respect that has implications for tax efficiency. Inequitable treatment of individuals similarly situated with respect to the tax base might be an indication that something has gone wrong in our tax policy. And so we might be well-advised to pay attention to large horizontal inequities. But this does not, Kaplow points out, amount to any sort of an argument for caring intrinsically about horizontal equity or aiming for horizontal equity when designing tax policy. On the contrary, if horizontal equity is useful as a very rough proxy for welfare maximization, then the correct policy is to set taxes so as to maximize welfare regardless of whether doing so satisfies horizontal equity. In any case, even if we can make only very approximate judgments about welfare maximizing tax policy, horizontal equity is such a course-grained proxy that it is not of great use.

These arguments against tax equity principles have considerable intuitive appeal. I agree with Murphy and Nagel that property rights are conventional in the sense that people do not have pre-institutional property entitlements to particular objects external to their bodies and that it is myopic to consider the justification of property rights in isolation from tax policy. But from the fact that property rights are conventional and that nobody has a non-institutional right to particular property entitlements, it does not follow that rules governing the creation and transfer of property entitlements cannot be judged unfair against the conventional baseline. People care about fair

29. Id. at 396–97.
30. Id. at 400–01.
31. This leaves open the possibility that people have a natural right to acquire some form of private property that must be respected in any just institutional arrangement. Eric Mack has advanced this interpretation of natural property rights. See Eric Mack, The Natural Right of Property, 27 SOC. PHIL. & POL’Y 53, 53–78 (2010).
33. Kevin Kordana and David Tabachnick criticize Murphy and Nagel for failing to recognize that one could reject pre-institutional entitlements to property while recognizing a role for “benefits” or “equal sacrifice” principles of tax fairness. Considerations of horizontal equity might become normatively relevant either on a
procedures in a great range of cases in which nobody has any antecedent right to a particular outcome. For example, nepotistic hiring procedures for government bureaucracies might be considered procedurally unfair even when there is no uniquely justified merit based hiring procedure such that any particular candidate has a claim to be hired on the merits. So there is nothing especially incongruous about rules of fairness that measure tax obligations in relation to property holdings even if nobody deserves their pre-tax property holdings as a matter of natural right. The challenge for defenders of tax equity is to develop a positive case for concern with horizontal and vertical equity as norms that constrain the translation of property holdings into tax obligations. This argument must show which of the many conceptions of horizontal equity should be preferred and show why horizontal equity should sometimes be preferred to welfare considerations.

III. Three Perspectives on Fairness

There are at least three distinct ways to justify rules of fairness. I am concerned here with distributive fairness, although some of the analysis is likely to apply more broadly. My diagnosis of the debate over horizontal equity will be that horizontal equity makes little sense according to two modes of justification, but can be defended using a third justificatory strategy. Most prominent critiques of horizontal equity focus on this first conception of distributive fairness according to which horizontal equity is, indeed, an unhelpful formalism. But this is not the only way to justify rules of fairness and is not always the most appropriate approach.

The first approach to fairness analyzes fair rules as rules derived from a comprehensive theory of distributive justice such as utilitarianism or John Rawls’s two principles of justice. This approach is the standard one in political philosophy and is often deployed in legal theory, although sometimes under the guise of wealth maximization or maximization of aggregate welfare. Evaluation of this type of fairness proceeds in two stages. At the first stage, we use some comprehensive normative theory to rank outcomes. 

benefits theory or on an “equal sacrifice” theory. They conclude that “[w]hile it is true that there can be no blanket rule requiring horizontal equity, it does not follow that issues of uniformity do not count at all . . . Issues of uniformity can be relevant, if subordinate, to distributive aims.” Kevin A. Kordana & David H. Tabachnick, Tax and the Philosopher’s Stone, 89 VA. L. REV. 647, 663 (2003). Although this somewhat minimalist defense of horizontal equity seems plausible to me, I will argue that tax equity principles have a somewhat different, and potentially more central, role in tax fairness.

34. Perceptions of procedural fairness also play a large role in the legitimacy of governmental authorities. See Tom R. Tyler, Why People Obey the Law 161–65 (1990).
Utilitarianism, for example, ranks outcomes by considering levels of aggregate utility. A Rawlsian would rank outcomes in terms of the primary goods available to the least well off portion of the population. A more radical egalitarian might rank outcomes in terms of the degree of social inequalities they generate. More complex formulae are possible as well. For example, one might give priority to the least advantaged up to some level of welfare and then apply utilitarian calculus. Since John Rawls published *A Theory of Justice* in 1971, much work in Anglo-American political philosophy has focused on how to rank outcomes and so the menu of options is rather intricate. Once a ranking of possible outcomes has been established, the next step is to derive a body of rules that brings about the feasible outcome that ranks most highly. Rawlsians favor tax laws that, in conjunction with laws concerning property, contract, employment, entitlements and so on, maximize the prospects of the least advantaged group of citizens. A utilitarian, on the other hand, would design laws so as to maximize aggregate welfare. In neither case is there anything normatively distinctive about tax laws or tax policy. Taxes are just another tool to achieve distributive aims (albeit a highly useful and important tool). And they are to be judged by the same normative standards as the other tools.

35. Since there are many different ways that one might define utility, utilitarianism is really a family of theories, not a single theory.

36. As with utilitarianism, the details could be filled in a number of different ways.


38. Classical utilitarianism and other consequentialist theories are sometimes thought to be alternatives to concern with distributive fairness. See, e.g., Kaplow & Shavell, *Fairness vs. Welfare*, supra note 15, at 52–62. When I refer here to distributive fairness, I am not using the term to refer exclusively to non-welfarist considerations in the way that Kaplow and Shavell do. In fact, welfare maximization can plausibly be defended on grounds that are very similar to Rawls’s derivation of the difference principle. Suppose fairness requires the adoption of distributive principles that a self-interested person (or a benevolent, impartial spectator) would pick if she had an equal chance to be anyone in society. It is highly plausible that she would choose principles that maximize aggregate welfare since this would maximize her expected welfare. See John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. Pol. Econ. 309, 309–21 (1955). Louis Kaplow appeals explicitly to Harsanyi’s defense of utilitarianism in arguing that tax policy should be set according to utilitarian principles rather than tax equity considerations. See Kaplow, *A Fundamental Objection*, supra note 21, at 502–04. For the purposes that I am concerned with here, Rawls’s and Harsanyi’s arguments are rival versions of the same strategy.
This approach to distributive justice has a lot going for it. My point in this Article is not that such theories are not vital—they are—but merely that they are not the only way to approach questions of tax fairness. Rawlsian distributive justice, utilitarianism and similar comprehensive theories of distributive justice are powerful in that they can be used to weigh a huge range normatively relevant factors and can be applied to all kinds of policy questions. This makes them well-suited to ground academic discussions of taxation (e.g., Louis Kaplow’s theory of optimal taxation based on utilitarian moral principles), as well as for fine-grained analysis of particular policy proposals. For example, utilitarianism has the advantage that it can suggest how to make trade-offs between highly disparate considerations such as administrative efficiency and redistribution to the less well off. Such theories have the weakness, however, of requiring agreement on a fully specified theory of justice in order to generate policy recommendations. For example, the question of how progressive tax rates should be depends on the precise details of one’s theory of distributive justice as well as upon a host of complex empirical questions. Utilitarians disagree with egalitarians and different sorts of egalitarians have disagreements with each other. When people disagree on abstract principles of distributive justice, comprehensive theories tend to provide little help in securing agreement on particular rules of fairness. Instead, they encourage ideological conflict as supporters of differing tax policies (who might be motivated by an ambiguous mixture of private interest and public-spiritedness) appeal to rival theories of distributive justice in order to bolster their positions. The interminable debate over progressive taxation in the United States is a familiar example.

A second way of justifying rules of fairness is the theory of overlapping consensus. This approach was developed in response to the worry that when people appeal to comprehensive theories of distributive fairness, agreement about anything seems to require agreement about everything. Under the theory of overlapping consensus, different people may embrace different comprehensive theories of justice but nevertheless agree on certain principles that are independently justified under each of their theories. For example, arguments from a variety of perspectives might converge on a principle of freedom of speech. Natural rights theorists can support broad protections for speech as an important natural liberty. Consequentialists can support free speech for Millian reasons: over the long run, free and open discussion is the best way to arrive at the truth. Members of particular religious groups might support freedom of speech based on the tenants of their

religion or as a corollary to their commitment to freedom of conscience. Other justifications of free speech are possible as well. Overlapping consensus is closely related to Cass Sunstein’s notion of an incompletely theorized agreement. Because an incompletely theorized agreement can be justified in different ways by different comprehensive theory of justice, such agreements are often good strategies for reaching an overlapping consensus. Although I will argue that tax equity principles can be endorsed by people with a range of views concerning distributive justice, I do not think this is a matter of overlapping consensus in the sense discussed by Rawls or an incompletely theorized agreement in the sense discussed by Sunstein. Tax equity principles are not an area of partial agreement between rival comprehensive theories of distributive justice. In fact, tax equity principles are most useful precisely when differing theories of distributive justice do not yield an overlapping consensus about tax policy as is the case when some people support strongly redistributive taxation and other people oppose it. As will be argued below, horizontal equity might emerge as a compromise principle even when this is not precisely what any individual would choose if given a free hand to determine tax policy according to her preferred theory of distributive justice.

My defense of tax fairness is based neither on a comprehensive theory of distributive justice nor on an overlapping consensus, but on a third approach to distributive fairness. Rather than thinking of rules of fairness as entailments of some comprehensive theory of justice, one might instead analyze fairness norms as conventional arrangements that facilitate cooperation between people with partially overlapping interests and differing views about distributive justice. Fairness norms of this type are conventional in the sense that they depend on the willingness of people to act fairly on the condition that others do so as well. It might be helpful to think of this sort of fairness norm as something like a kind of useful technology rather than as eternal principles of justice. Conventional rules of fairness are context sensitive, but are highly useful in the right circumstances. This sort of fairness—I will call it conventional fairness—involves the division of gains from cooperation in a way that promotes the long-run interests of all those in the cooperative


43. In his influential analysis of social norms Robert Sugden suggests that rules are likely to acquire moral force under two conditions: “[1] Everyone (or almost everyone) in the relevant community follows the rule [and] 2[.] If any individual follows the rule, it is in his interest that his opponents – that is, the people with whom he deals – follow it too.” ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE 170 (2004). For this reason, fairness norms tend to become moralized, although they can also function as amoral conventions as well. In such cases, people follow the convention out of a sense of self-interest and do not blame others for violating it.
scheme. Conventional fairness rules divide benefits in such a way that no potential gains are left on the table (i.e., the result is Pareto efficient) and that all participants have incentive to continue the cooperative relationship over the long haul. Conventional fairness is especially useful in contexts where there is a range of efficient outcomes and it is important for people to coordinate on one of many possible rules. Familiar conventional rules of fairness require respecting the property of others, sharing gains from a collective venture with one’s partners and contributing one’s fair share to public goods. Conventional fairness does not require equal treatment according to any particular standard, only that the rules are applied impartially and without favoritism so as to provide benefits to all who cooperate. Nevertheless, equality in contributions or benefits is often a psychologically salient solution to a bargaining problem. Thus it is common for business partners to split profits equally or homeowners to make equal contributions to a neighborhood association even when some more complex formula that weighs a range of pertinent considerations might apportion benefits and burdens slightly differently.

Conventional fairness is non-ideal in the sense that it does not require agreement on common principles of distributive justice. In fact, it is especially useful in contexts in which people disagree about abstract, large-scale principles of distributive justice. Conventional fairness requires only that all agree that following a new norm would be better than the status quo and are willing to follow it on the condition that others do so as well. In this sense, it

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45. The economist Ken Binmore argues that “fairness norms evolved because they allow groups who employ them to coordinate quickly on more efficient equilibria as they become available, and hence to outperform groups that remain stuck at the old equilibrium.” Ken Binmore, Natural Justice 171 (2005).

46. H. Peyton Young, Equity: In Theory and Practice 19 (1994) (“In problems of local justice, equity and efficiency often complement each other. Principles of equity are the instruments by which societies resolve distributive problems when efficiency by itself yields indeterminate results.”) [hereinafter Young, Equity].

47. Conventional fairness is thus well suited for people who are conditional cooperators. That is, they are willing to follow rules that promote the common good even at some personal sacrifice but only on the condition that others will do so as well. Conditional cooperators differ on the one hand from pure altruists who act for the
represents a “bottom-up” approach to fairness as opposed to “top-down” theories that conceive of fair rules as ones that are part of a system that brings about desirable outcomes. Fairness rules of this third type thus play three roles: they select an equilibrium that allows people to coordinate their behavior, they divide cooperative surplus so that all have incentive to cooperate, and they legitimate distributive choices by providing a standard for division of surplus that is independent of the identities of particular people and does not depend on evaluation of their moral merits.\textsuperscript{48} Although conventional fairness follows a consequentialist logic, it is distinct from the norm of welfare maximization favored by Louis Kaplow. Fair rules improve on the status quo by the standards of all cooperators and in this sense are equitable, but do not necessarily bring about results that are welfare maximizing. Some welfare maximizing rules are unstable in contexts that require some degree of voluntary compliance and thus are not possible objects of conventions. And because an outcome may be an unambiguous improvement over the status quo without being the best possible result by anyone’s standards, fairness by convention may not select welfare maximizing options even when available. This is not, however, a reason to reject conventional fairness. In circumstances that require cooperation between people who disagree about ideal justice, conventional fairness has a vital role to play.

\textsuperscript{48} H. Peyton Young concludes his book on equity with the following reflection:

\begin{center}
\begin{quote}
Why does it matter whether allocations are equitable? . . . A public agency that undertakes this type of analysis protects itself from charges of favoritism and capriciousness. Even for groups that theoretically could negotiate any solution they please, equity plays a critical role . . . . The reason is that distributive bargains are difficult to achieve without a framework that focuses the bargainers’ attention on particular outcomes. Equity principles play this role by defining which outcomes are more appropriate than others. The reason that equity is important, therefore, is that it coordinates and legitimates distributive choices . . . . Even when there is substantial disagreement about the relevant principles, however, it may still be possible to fashion outcomes that command broad support by explicitly following a process that takes differences of opinion into account, and strikes a balance between competing points of view.
\end{quote}
\end{center}

\textsuperscript{Young, EQUITY, supra note 46, at 166--67. My suggestion is that horizontal and vertical equity play a similar role in tax policy.
IV. A DEFENSE OF TAX EQUITY

The conventional fairness suggests a normative foundation for principles of tax equity without appeal to natural rights or pre-institutional moral desert. Even if one rejects theories of natural property rights, giving normative weight to pre-tax ownership may have value in preventing tax policy from unsettling the property entitlements fixed by private law. Horizontal equity and the minimalist principle of vertical equity are best understood as compromise principles for people who disagree about the empirical and moral facts bearing on the justice of redistributive taxation in order to prevent conflict over tax policy from generating the sort of negative sum resource conflict that property rights serve to prevent.49 What ideal theory of the sort favored by Murphy, Nagel and Kaplow obscures is the importance of principles, such as horizontal and vertical equity for structuring agreement between people who have starkly opposing moral and empirical commitments. Non-ideal theory, by contrast, addresses the problem of cooperation under conditions of moral disagreement and thus provides resources to understand fairness rules that seem irrational when considered from the perspective of ideal theory.

An analogy to justifications of private property rights might help illuminate the role of tax equity principles. John Locke argued that people have a natural right to acquire property by mixing their labor with it so long as they leave “enough and as good” for others to use.50 Once property has been appropriated in this way, others are bound to respect an owner’s property rights and the state (if one comes into being) is bound to protect them. David Hume, by contrast, denied that property was a natural right and instead argued that property rights evolved as conventions of respect for the possessions of

49. The only similar critique of Murphy and Nagel’s work that I am aware of is Brian Galle’s. See Brian Galle, Tax Fairness, 65 Wash. & Lee L. Rev. 1323, 1323–79 (2008). Galle argues that “horizontal equity can be reconceived as a commitment by the authors of tax legislation to honor the past and future policy choices of others, with whom they are jointly engaged in a project of deliberative democracy. Alternately, horizontal equity may be justified by welfare gains from a shared agreement to leave certain controversial questions of distributive justice undecided during the revenue-raising process.” Id. at 1323. My case for tax fairness unifies Galle’s alternative justifications of horizontal equity by showing how treating the existing distribution of property as normatively significant leads to welfare gains over the long run even if one does not assume that this distribution has any other morally attractive characteristics or that the policy choices of previous policymakers reflect any special moral insight.

others.51 Such possessions might have been originally acquired by means fair or foul (and any clear eyed view of history reveals that it quite often is the latter). Over time, people come to see the advantages of respecting the possessions of others on the condition that others do the same and a rudimentary property convention emerges: I will not trespass on your land or take your possessions so long as you do not trespass on my land or take my possessions. This property convention might not comport with anyone’s ideal conception of justice in the distribution of property rights. It certainly does not maximally serve the interests of any person since all people would be better off if they enjoyed their own possessions and were free to help themselves to those of others. Nevertheless, the property convention is an improvement over the status quo for all who are party to the convention.52 Observance of conventional property rights prevents negative sum free-for-all conflicts over resources and promises stable enjoyment of some possessions. Compared to a free-for-all, this is to the long-run advantage of all possessors of property and even benefits those who do not possess much property, but enjoy the increased security and prosperity brought about by respect for property conventions. Property rights, and indeed private law more generally, serve to prevent wasteful conflict by providing authoritative rules that determine who may take what actions with respect to which resources. This is the case even for property conventions with morally neutral content, such as everyone gets enforceable property rights over whatever objects they currently possess (regardless of how they came to get them).

This analysis of the justification of private property might be extended to rules of fairness for apportioning the benefits and burdens of cooperation between property owners. Even when private law defines stable property rights, there is a danger that the equilibrium established in the private sphere will be upset by aggressive use of public law. Just as property rights function

51. “[J]ustice establishes itself by a kind of convention or agreement; that is, by a sense of interest, suppos’d to be common to all, and where every single act is perform’d in expectation that others are to perform the like.” DAVID HUME, A TREATISE OF HUMAN NATURE 498 (L. A. Selby-Bigge ed., 1896) (1738).

52. The question of whether those who have few possessions or none at all have reason (moral or material) to comply with the convention is complex. On the one hand, stability in possession and the greater peace and prosperity that they bring will, on average, benefit even those without property through higher wages, less warfare and the possibility of acquiring private property in the future. This must be balanced against the prospects from grabbing possessions in a free-for-all. Elsewhere, I argue that those currently without property usually do have reason to respect property conventions and that the conventional logic of property rights implies that private ownership of valuable resources should be coupled with significant social welfare provisions (of some form) that ensure that all share in the benefits of property conventions. See Lindsay, Humean Property Theory, supra note 19.
to prevent wasteful resource conflict in the private sphere, rules of tax fairness serve to constrain self-interested parties who may wish to use the tax system to gain at the expense of their fellow citizens. By requiring that similarly situated persons be treated similarly and that persons with more income pay more tax, principles of tax fairness limit the extent to which distributions of wealth that have been fixed by private law may be unsettled by public law. Horizontal and vertical equity do not rule out sharply progressive rates of taxation and so are fully consistent with high levels of redistribution from rich to poor. The minimal principle of vertical equity is violated by extreme forms of redistribution from poor to rich, such as a tax that applies to wage laborers and salaried workers but not to fund managers or a policy of allowing interest deductions for second homes but not for first cars. Horizontal equity is violated by certain kinds of redistribution between groups that are similarly situated with respect to income, such as redistribution from farmers to factory workers via a tax credit for “manufacturing labor.” The two principles thus rule out forms of redistribution that are prima facie suspicious while remaining neutral on the extent to which tax policy ought to mitigate income inequality as a general matter.

Different polities might adopt different tax bases (income, consumption, or wealth) or different levels of progressivity (different personal exemptions and different tax rates for income over a certain threshold). Since there is more than one way of specifying the tax base, there is more than one plausible fairness norm for taxation. As long as the tax base is wide, however, observance of tax fairness norms will constrain the extent to which tax policy can be used to destabilize relative property entitlements. Once a tax base has been fixed, the norm of horizontal equity requires that any difference in tax obligation for two people with the same position vis-à-vis the tax base must be justified in terms of some public interest other than raising revenue. Such justifications might include disincentives for socially harmful activities such

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53. John Miller makes a similar point in his qualified defense of tax equity principles. He suggests that horizontal equity:

[S]erves the limited, but crucial, purpose of checking that ordinary human impulse to let the other person carry the lion’s share of the tax burden. If we are only able to “tax that fellow behind the tree” by imposing an equally heavy burden on ourselves, a profound restraint may overtake us. Since the fellow behind the tree is subject to the same restraint, an allegiance to horizontal equity protects me from him as well as he from me. In our society a strong allegiance to horizontal equity serves as a way to avoid deep and abiding strife with respect to taxation.

as air pollution or subsidies for socially beneficial activities. Taxes used in this way as a sort of regulatory policy are known as Pigouvian taxes after the English economist, Arthur Cecil Pigou, who showed how taxes could be used to correct externalities by altering the market price of an activity so as to reflect total social cost.\textsuperscript{54} The opposite policy, tax deductions or tax credits designed to encourage certain forms of behavior, are really a covert sort of public spending—tax expenditures—and must be justified as a worthy use of public resources.\textsuperscript{55} Because candidates for Pigouvian taxes and subsidies are not especially hard to come by, the public interest criterion is not a hugely restrictive constraint.\textsuperscript{56} Therefore, the principle of horizontal equity should not be seen as ruling out any deviation from equal treatment of those equally positioned relative to the tax base, but as requiring a particular sort of justification for such deviations. Tax expenditures and Pigouvian taxes must not only serve a public purpose, but also be a more efficient means to this end than the alternatives including regulation and direct government spending.\textsuperscript{57} Because legislators are besieged by an endless army of special interest lobbyists whose job is to construct arguments that their clients’ favorite tax benefits are really in the public interest, principles of tax fairness exert less normative pressure in practice than if taxes were negotiated by taxpayers themselves. However, even in this dysfunctional context, compromise on a package of measures that reduce deductions and credits in order to lower tax rates or raise revenue is a promising formula for comprehensive tax reform.

Although tax fairness norms cannot be used to deduce a unique tax regime from a set of property entitlements, they serve to structure tax policy in a way that may be embraced by people with opposing policy preferences. Consider two people, John and Robert, who have fundamentally different views about distributive justice. John favors highly egalitarian tax and transfer policies, whereas Robert favors policies that do not greatly alter market outcomes. The current Code is somewhere between the policy preferences of John and Robert: John favors a more progressive Code and Robert favors a

\textsuperscript{54} See generally A. C. PIGOU, THE ECONOMICS OF WELFARE (1920).
\textsuperscript{56} See, e.g., Jonathan S. Masur & Eric A. Posner, Toward a Pigouvian State, 164 U. PA. L. REV. 93 (2015) (arguing that Pigouvian taxes are generally superior to “command and control” regulations and should play a greater role in regulatory policy).
\textsuperscript{57} Because tax expenditures are often poorly targeted even when they do have a genuinely public purpose (i.e., many people get a tax break for doing what they would do anyway), many violations of horizontal equity will fail this test even when they pass the public interest test. See Victor Fleischer, Curb Your Enthusiasm for Pigouvian Taxes, 68 VAND. L. REV. 1673 (2015) (observing that Pigouvian taxes are efficient responses to only a limited number of externalities).
less progressive Code. Given the current Code, John tends to favor any tax breaks that will result in a more egalitarian distribution of post-tax income, while Robert tends to favor tax breaks that will counteract progressive tax rates, thereby resulting in a less egalitarian distribution. Thus, John prefers to make food purchases at grocery stores deductible since this would benefit those with low-income more than those with high-income, but Robert would like to abolish limits on student loan and educational expense deductions for high-income taxpayers since this will tend to favor the wealthy and bring effective tax rates closer to his preferred flat tax. However, achieving “tax justice” through a motley assortment of tax breaks is inefficient. Additionally, it is unfair to those whose tastes are not favored by the resulting subsidies. It might be better for both John and Robert if they each agree to abstain from supporting these sorts of tax breaks even when one of them thinks the particular policy desirable in light of their larger theory of distributive justice. Adherence to horizontal equity, therefore, represents a compromise position that is neutral between John’s and Robert’s substantive views about progressive taxation, but will make the Code better by each of their lights at any given level of progressivity.\textsuperscript{58} The same may be true if John and Robert are self-interested taxpayers rather than ideologues: lower tax rates without tax subsidies are, \textit{ceteris paribus}, preferable to a patchwork of inefficient tax subsidies for both John and Robert if each prefers different subsidies and both are equally likely to get their preferred subsidies enacted. It may also be true if John and Robert are public-spirited citizens who share a common theory of justice, but disagree about the empirical consequences of various tax policies.

As the example of John and Robert suggests, norms of fair contribution are functionally similar to property rules in that, if they are generally respected, they prevent wasteful competition over resources. One of the virtues of private law (or at least the private law of major common law and civil law legal systems) is that it defines access to resources according to impersonal rules of a general character. Although the resulting distribution of property might sometimes turn out to be substantively undesirable, the process by which property entitlements are created and transferred will be (at least in a well-functioning legal system) procedurally fair in the sense that it does not result from favoritism to particular individuals or groups.\textsuperscript{59} It allows resolution of disputes over resources without resort either to moral first principles or to judgments about the general moral merits or demerits of particular individuals.

\textsuperscript{58} Note that this is not a case of overlapping consensus, but instead a sort of mutual disarmament. John and Robert each have different preferences for tax policy, yet each may be willing to give up some of their second best strategies if the other is willing to do so as well.

\textsuperscript{59} The contrast here is with estate based societies in which rights and duties are determined in large part by one’s social group, and thus, the same rules are not generally applicable to all members of society, but only to members of a particular estate.
For example, rather than asking who is most deserving of a particular plot of land, one need only to apply the preexisting legal rules that determine property entitlements. Tax laws that apply to abstract economic categories (property, income, or consumption) rather than to particular activities or to identifiable groups of people are, ceteris paribus, preferable for the same reason. By contrast, taxes, deductions, and credits targeted at narrow classes of readily identifiable individuals (for example, the tax on purchases of chocolate ice-cream) are prima facie suspicious. As Murphy and Nagel point out, it would be foolish to think that a taxpayer has a moral entitlement to any particular structure of relative prices.60 However, it does not follow from this that any way of setting prices is equally fair. Chocolate ice-cream lovers have no grounds for complaint if supply chain problems cause chocolate ice-cream to become more expensive than vanilla. However, it does seem objectionable if prices rise because those who do not like chocolate ice-cream succeed in shifting the tax burden to those who do.

There are at least two problems with arbitrary taxes and tax expenditures. First, they often represent rent-seeking behavior.61 Laws such as a deduction for vanilla ice-cream purchases do not have an even vaguely plausibly public purpose. Rather, the law is simply an attempt to shift the tax burden from one group of people to another. It is the functional equivalent of a wealth transfer that distorts private consumption decisions. For this reason, rent-seeking taxes and tax subsidies are likely to be negative sum policies. Second, narrowly targeted taxes and tax expenditures have the effect of substituting public judgments about what is worth consuming for private judgments. This effect is particularly strong at high marginal tax rates. Substituting public judgment for private judgment burdens citizens with minority tastes. This may be entirely appropriate when people have private preferences for socially harmful activities, such as air pollution, alcohol use, and so forth. However, since one of the purposes of private property is to provide a sphere of individual control in which individuals may make choices according to their own values and own tastes, allowing majority tastes (or the interests of a concentrated minority) to trump minority tastes undermines part of the rationale for private ownership. If my neighbor prefers relatively larger houses than I do, then this is a good reason for him to buy a larger house and

60. MURPHY & NAGEL, MYTH OF OWNERSHIP, supra note 9 at 109.
61. Rent-seeking is behavior that aims to achieve profit beyond the normal risk adjusted rate of return by receiving special privileges from the government. “Rents” in this sense of the term might include monopoly privileges, state subsidies, or regulations that provide special benefits to particular parties. Unlike profits earned in competitive markets through more efficient production, “rents” do not represent gains in national wealth but rather wealth transfers from one party to another. See generally Anne Krueger, The Political Economy of the Rent-Seeking Society, 64 AM. ECON. REV. 291 (1974).
for me to buy a smaller one, but not a good reason for the government to tax me more than him.  

Although some degree of such unfairness is inevitable (in particular, it is very hard to treat preferences for consumption of leisure and market goods symmetrically), this does not mean that we should give up on the notion of tax neutrality altogether in favor of some fully specified theory of distributive justice.

People do not need to agree on principles of distributive justice to agree that rent-seeking tax discrimination is an unfair allocation of burdens. Horizontal equity serves to pick out normatively suspect tax provisions. As the John and Robert example showed, it is advantageous for people with differing views on progressive taxation to agree on opposing policies that violate horizontal or vertical equity without any justification in terms of regulation of externalities. Fairness judgments that track such hypothetical agreements play a valuable role by ruling out certain policies even in the face of disagreement over larger questions of distributive justice or empirical uncertainty about their consequences. Evaluating tax policy exclusively from the perspective of post-tax outcomes effaces the role of fairness norms in allowing people with disparate views to cooperate on questions of tax policy. If a single person could design and guarantee enforcement of a tax code that perfectly implements his or her ideal theory of distributive justice, he or she could ignore metrics, such as horizontal and vertical equity that use pretax holdings or income as a normative baseline. However, this is not remotely like the situation faced by anyone living under a democratic government. Therefore, tax fairness is a genuine concern for real world (as opposed to ideal theory) tax policy, and not merely a distraction from the real questions of distributive justice or optimal

62. Murphy and Nagel think that this question should be decided on the basis of

(a) whether it distorts the broader pattern of redistribution and financing of public provision that our general conception of justice requires, by shifting some of the costs or by surreptitiously diminishing or increasing the amount of redistribution; (b) whether it serves other purposes, legitimate for fiscal policy, which are important enough to override any such shortfall.

MURPHY & NAGEL, MYTH OF OWNERSHIP, supra note 9, at 171. This analysis seems to identify the right trade-off. However, it is possible to bracket questions concerning general conceptions of justice and to simply ask whether the policy benefits are worth the violation of horizontal equity (a principle that may be shared by partisans of widely differing conceptions of justice).

63. Indeed, modern tax codes are sufficiently complex that they will require coordination between different officials even in a political regime in which decision makers are not accountable to the populace.
taxation. Property entitlements provide a useful baseline against which to evaluate public goods contributions precisely so that discussion of tax obligations does not reduce to the question of who deserves what post-tax income. Rules of tax equity secure a stable framework for mutually advantageous cooperation rather than arrange affairs to correspond to principles of justice extrinsic to our actual institutions. Using pretax income as a normative baseline is instrumental to this end whether or not it has any other special moral status.

This bottom-up perspective on tax fairness can illuminate the debate over the flat tax. One could make an argument for proportionate taxation (i.e., the flat tax) analogous to the defense of horizontal equity outlined above. One of the dangers of any scheme of taxation, particularly when combined with generous transfer payments, is that the tax system will be used to entirely efface the pattern of entitlements generated by the relatively impersonal rules of private law by redistribution in accordance with political power. One might think that the former tends to be a positive sum, whereas the latter tends to be a negative sum game.64 In other words, where property law is supposed to define entitlements in such a way as to prevent a wasteful free-for-all, a regime of excessive and inequitable taxation may serve to unsettle distributive questions by recreating a free-for-all in the political arena. This is pathological. Opponents and proponents of proportionate taxation should be able to agree that the minimal principle of vertical equity is a good heuristic for distinguishing tax schemes (especially regressive schemes)65 designed to transfer wealth from the less powerful to the more powerful from tax regimes that might have a plausible justification in terms of risk spreading. Taxation proportional to income or wealth might be best justified by analogy to vertical equity as a psychologically salient compromise rule that severely constrains use of the Code for negative sum redistribution and other forms of wasteful rent seeking. Barbara Fried suggests psychological salience as a deflationary explanation for the broad popularity of proportional taxation schemes (including among unlikely figures such as John Rawls).66 But if the foregoing

64. Of course, it is hard to generalize here. If private law is configured to give a few individuals monopolistic positions that allow them to accrue great rents at the expense of everyone else, private ordering could be quite undesirable. Conversely, risk-spreading via tax and transfer programs may be generally positive sum.

65. Since wealthy people are likely to have disproportionate political power for a variety of reasons, regressive tax schemes that shift the tax burden onto non-elites are quite common in the historical record. Democratic government may be atypical in this respect.

66. Fried argues,

The ‘focal point’ explanation may explain why people as divergent in their political commitments as Rawls, Hayek, Gauthier and
defense of fairness norms in taxation is correct, then the argument from psychological salience may be quite plausible under certain conditions. Insofar as stable convergence of judgment among persons with disparate moral commitments is important, psychological salience is a normatively relevant factor. Whether this is a good argument for adopting a flat tax depends on institutional context. In affluent countries with stable and relatively well-functioning political systems, I do not see great value in requiring proportionate taxation, especially if norms of vertical equity are observed so as to prevent upward redistribution, which is broadly agreed to be undesirable as a matter of principle.67 Under conditions of poorly constrained governments, low social trust, highly predatory elites, or class or ethnic conflicts that lend themselves to a taste for punitive taxation, the case for norms that sharply constrain taxation authority is stronger.68 The larger point here is that there may be some trade-off between institutional stability and the ability to achieve optimal policy. Norms that provide greater stability and protect against governmental predation sometimes impede the pursuit of optimal policy. The costs and benefits of this trade-off will be different in every context.

This defense of horizontal equity as a principle of fairness is responsive to the criticisms advanced by Murphy, Nagel and Kaplow. It provides reason to think, pace Murphy and Nagel, that pre-tax income is normatively significant. It does so not by defending a controversial theory of Epstein have gravitated towards proportionate rates to begin with, as good-faith, unselfconscious participants in a Schelling-like convergence. It may also explain why people like Epstein and Hayek, who are clearly predisposed against progressive taxation on libertarian or quasi-libertarian grounds, would fix on flat rates for strategic reasons, seeing it as an alternative that is both politically obtainable and politically sustainable.


67. Insofar as the real problem is rent-seeking, comparison of the United States corporate tax code and individual tax code suggests that eliminating progressive tax rates would not be helpful in the United States. The corporate tax rate is 35 percent for all midsized or large corporations, but the effective tax rate varies greatly across different companies and across different sectors of the economy. See Aswath Damodaran, Tax Rate by Sector (U.S.), http://people.stern.nyu.edu/adamodar/New_Home_Page/datafile/taxrate.htm (last updated Jan. 2016) (providing recent data on the effective corporate tax rates across by sector in the United States). The individual tax code is less distorted by credits and deductions despite a far more progressive rate structure.

68. Of course, under these conditions, it is likely to be difficult to reach agreement on proportionate taxation or even to inculcate the necessary sense of fairness, so it may be that the flat tax is infeasible precisely where it is needed.
natural rights or moral desert, but by showing how treating pre-tax income as a normative baseline improves tax policy. It addresses Kaplow’s critique by suggesting that optimal tax analysis and horizontal equity are not competitors, but play different roles that are relevant at different levels of analysis. Utilitarianism is an ideal theory of distributive justice that competes with other ideal theories such as neo-Lockean natural rights theories and Rawls’ difference principle. Horizontal equity is an intermediate level principle suitable for non-ideal circumstances. A utilitarian might endorse horizontal equity as a compromise position when making policy with non-utilitarians. The point is not merely that horizontal equity is a proxy for utility—although it may also be that—but that adhering to it consistently will improve the Code according to a range of ideal theories and so, unlike other proxies for utility maximization, it is one that can allow utilitarians to find common ground with non-utilitarians. When utilitarians find themselves able to implement policy without negotiation with others, they may eschew tax equity principles and focus on welfare maximization directly. This may sometimes be the case when regulatory agencies have broad discretion to craft policy. Tax legislation, by contrast, is usually the product of negotiation between legislators who represent a wide range of interests and are unlikely (to the extent that they think about them at all) to agree on ideal principles of tax fairness.

Finally, my defense of horizontal equity does not require that we resolve the question of which interpretation of horizontal equity is the “right” one. Because horizontal equity is a conventional principle of justice, the appropriate interpretation depends on the background conditions, in this case the tax base. Equal taxation for those with equal levels of consumption is appropriate in a consumption tax system, whereas equal taxation for those with equal incomes is appropriate in an income tax system and so forth. My defense of horizontal equity is neutral on the question of whether we should prefer a tax base of consumption, income or wealth. Such questions must be decided on other grounds.

Horizontal equity has a limited, but potentially important role. It does not represent a deep principle of justice in the way that welfare maximization or the difference principle might. Instead, it is a principle of non-ideal fairness useful for constraining tax policy in contexts of ideological disagreement. If one is accustomed to thinking of justice in terms of ideal theory, this might seem disappointing or deflationary. However, since ideological disagreement over taxation is pervasive, non-ideal theory is highly germane in this context. The real limitation on the normative force of horizontal equity is its conventional nature. In order for horizontal equity to serve as a focal point for compromise, a particular interpretation of horizontal equity must enjoy broad acceptance and there must be a degree of trust that others abide by conventional rules of fairness. Because conventional norms depend upon broad acceptance, we should worry that arguments against the coherence of tax equity principles may be self-fulfilling. Since the normative force of
horizontal equity is that it is a focal point for agreement between people with differing interests and normative commitments, it makes no sense to worry about tax equity principles if no one else in society pays any heed to them or thinks that they have any significance. In such cases, it is best to pursue the policies indicated by one’s preferred mode of ideal theory. Horizontal equity does seem to have had influence in the twentieth century both because of the arguments of public finance economists, such as Richard Musgrave and Joseph Pechman, and because of its intuitive appeal to the general public. Its advantages could be lost if tax equity principles are ridiculed out of serious-minded policy discourse.

V. IS HORIZONTAL EQUITY VACUOUS OR BANAL?

The question of the appropriate tax base suggests a potentially fatal objection to my defense of horizontal equity. Horizontal equity is a vacuous principle until the tax base is defined. One might worry that any tax scheme may be horizontally equitable if the tax base is defined precisely so as to exclude all deductible and creditable items. For example, if one wants to impose a special tax on certain exotic animals and give tax deductions for tourism in Michigan’s Upper Peninsula, one could define the tax base as all income, plus the value of all zebras and capybaras owned by taxpayers less expenditures on vacations in the Upper Peninsula. Although these policies are frivolous, a large number of deductions including education and medical expenses can plausibly be defended as “not really income” in the relevant sense either because they are really a form of investment\(^69\) or because they represent non-discretionary spending that is categorically different from other consumption.\(^70\) The danger is that any credit, deduction, or surcharge may be justified by defining the tax base so that it includes or excludes the relevant items. If so, all disputes over taxes, credits, and deductions could be recast as disputes over rival principles of horizontal equity. Some limits must be placed on what can count as an acceptable tax base for horizontal equity to be a principle that meaningfully constrains tax policy.

At minimum, the tax base must meet three criteria. First, it must be broad. If a tax that is paid into general revenue affects only a small number of people, there is reason to worry that the relationship between taxpayers and non-taxpayers is inequitable even if the tax is horizontally equitable with

\(^{69}\) Technically, this suggests that education should be treated as a capital asset and should give the taxpayer basis that might be deducted against future labor income attributable to investments in education. However, this scheme would probably be too hard to administer through the Code given the difficulty of determining baseline income.

\(^{70}\) Given the current structure of health care spending, this does not seem especially realistic. It may have been more realistic in the early twentieth century.
respect to those who do pay it. Second, the tax base should be psychologically salient. An overly complex tax base is not likely to trigger intuitions concerning equity. Additionally, if people have difficulty keeping track of their position relative to others, horizontally equitable tax rates are unlikely to have a legitimating effect. Finally, the tax base should be economically meaningful. A tax base that does not track citizens’ economic status reasonably well will not be perceived as fair even if tax rates are horizontally equitable relative to this base. These criteria leave open a wide array of options. Income taxes, wealth taxes, VATs, endowment taxes (taxes based on ability to earn), and consumption taxes all easily qualify. However, tariffs, luxury taxes, and payroll taxes seem questionable, at least if they are used primarily to raise general purpose revenue and not for some other end, such as industrial policy or to fund a program specifically related to the nature of the tax such as unemployment insurance financed by a payroll tax.

Of course, even if the economic nature of the tax base (i.e., income, consumption, wealth) has been settled, there are thousands of minor questions concerning what counts as income or consumption. Some of these can be settled by basic economic principles. For example, jury duty pay should count as income in an income tax system whereas insurance payments for property damage should not. Others, however, have no obvious theoretical answer: who counts as a taxpayer? How should we distinguish between deductible business expenses and non-deductible personal expenses when a purchase has dual purposes? Some questions will be settled on grounds of administrative convenience or, when there are off-setting considerations on each side, on more or less arbitrary grounds. Considerations of horizontal equity cannot be used to resolve all important tax questions. Horizontal equity plays an important, but limited, role and is not an all-purpose solution for any tax policy problem. Forcing horizontal equity to bear too much weight is, if my account is correct, one reason that previous treatments of the principle have been unsatisfying.

71. Even when people agree on tax equity principles in the abstract, there is a danger that there will be no agreement on the tax base against which to measure tax equity. This is particularly likely when a tax code has become so chaotic that it is genuinely unclear whether, for example, it best approximates an income tax or a consumption tax. The difference between the two is less obvious than it might seem because one might approximate a consumption tax by implementing an income tax in which investment income is exempted from taxation. There is no fact of the matter in terms internal to tax equity about whether horizontal equity vis-à-vis income is preferable to horizontal equity vis-à-vis consumption. When faced with an extremely chaotic tax code, people might reasonably embrace conflicting interpretations of horizontal equity. Tax equity will, therefore, tend to have greater efficacy a relatively well-ordered tax system than in one that has become arbitrary to the point of incoherence.
Simple interpretations of horizontal equity are preferable to highly complex ones because they reduce disagreement over whether particular policies are equitable or inequitable. This provides reason to favor interpretations of horizontal equity expressed in terms of financial metrics (such as the amount of tax owed) rather than utility metrics (such as reductions in welfare). Measuring horizontal equity in terms of equal sacrifice of utility is attractive insofar as it addresses the problem that people with the same level of income may have quite different marginal utilities of income because, for example, they have different tastes for labor and leisure. Although measuring changes in utility is preferable to measuring changes in income in the sense that utility is more normatively important, this benefit may be outweighed by the uncertainty involved in converting units of income to units of utility. The assessment of income tax on households rather than on individuals presents a further complication for utility-based metrics. Comparing tax obligations across households poses no difficulty. Comparing utility levels, however, introduces a host of difficult problems. Whereas it is economically meaningful to talk of the income or wealth enjoyed by a household, it is rather fantastical to attribute utility to the household as a collective entity. Households are made up of individuals each of whom has their own utility function. A change in tax policy might have quite different consequences for different members of the same household. The dynamics are likely to be different in single earner households than for dual income couples and different for households with children and without children. Although one can create sophisticated economic models to describe these dynamics, it is hard to see how a policy can be publicly recognized as horizontally equitable in utility terms. Rather than seeking out an ideal interpretation of horizontal equity in terms of utility, it is probably better to stick with metrics such as income or wealth that can be defined in terms that are relatively transparent.

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72. See Feldstein, Compensation in Tax Reform, supra note 4, at 124.
73. Similar considerations disfavor changes to the tax base. Because horizontal equity is measured in relation to a particular tax base, changes to the tax base tend to destabilize conventions of tax equity. For this reason, once a broad and economically meaningful tax base has been specified and taxes are set so as to be horizontally equitable relative to this base, there should be a presumption in favor of letting well enough alone. Moreover, because taxpayers plan their activities in light of the law, any significant change in the law will usually entail “transition costs” as taxpayers rearrange their activities in light of the new laws. See, e.g., Kyle D. Logue, Legal Expectations, Rational Expectations and Legal Progress, 13 J. COMTEMP. LEGAL ISSUES 211 (2003); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509 (1986); Michael Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 U. PA. L. REV. 47 (1977). Changes in tax law will, ceteris paribus, be wasteful. That the tax base could have been specified differently if one were designing the Code from scratch is not reason to think that
An altogether different reason for thinking that horizontal equity is trivial is the objection that it does not rule out any sort of taxation that can be endorsed on principled grounds. Horizontal equity might, according to this objection, be a useful heuristic for identifying suspicious provisions in the Code, but does not do any real normative work because all good faith observers will generally oppose horizontally inequitable policies on other grounds. This conclusion is too strong. As already noted, welfare maximizing tax policy can be proven to violate horizontal equity given certain plausible assumptions. In a variety of contexts there is an efficiency case for arranging tax burdens in a way that violates horizontal equity. This means that utilitarians must sometimes decide whether potential increases in welfare from more efficient tax policies are worth the potential future reductions of welfare that may result from undermining horizontal equity as a focal point for compromise. One example involves so-called Ramsey taxation. The intuitive idea behind Ramsey taxation is that taxes are more efficient insofar as they do not change behavior. If revenue is raised through a consumption tax, higher taxes on products with relatively inelastic demand curves will be more efficient than taxes levied on products for which demand is elastic. Inelastic demand curves are ones for which changes in consumption are not very sensitive to changes in price and so when the price to consumers is increased by the imposition of a tax, consumer behavior changes little. Although Ramsey taxation might be economically efficient, it may have sharply differing effects on people with similar levels of consumption or income. If one person is inclined to consume more of the taxed product than another person, the first person will bear more of the tax burden. Although the tax elasticities of labor supply are probably less than those of demand for most consumer items (in other words, people are less likely to change their work habits in response to taxation than they are to change their buying habits), it is possible to use a similar strategy with respect to taxation of income. This would involve taxing people at different rates depending on whether they fall into groups likely to work less when faced with higher taxes. It is possible, therefore, for

changes to an existing tax base should be taken lightly. These considerations do not outweigh the gains from very substantial improvements in the Code, but do call into question whether the advantages of smaller improvements are worth the costs. In any case, the difficulty of making significant changes in the Code might render these considerations somewhat less practically significant in the U.S. context.

76. Arguably the Code already does so to the extent that it allows entrepreneurs (who might be more tax sensitive) to realize some of their income as capital gains and thus pay a lower effective tax rate than salaried employees. However,
horizontal equity to conflict with considerations of economic efficiency (as well as a variety of other considerations). This is not to say that horizontal equity should always trump other normative considerations. Judgments must be made on a case-by-case basis. Since the value of horizontal equity depends heavily on context, it is not possible to give a mechanical account of how to resolve such questions. In general, however, small deviations from horizontal equity should not trump large gains in efficiency, but small gains in efficiency are usually not worth very large deviations from horizontal equity.

VI. DOES HORIZONTAL EQUITY MATTER IN PRACTICE?

The last several sections have been devoted to a theoretical exploration of the significance of horizontal equity as a principle of fairness that facilitates coordination on tax law between persons with differing normative or empirical views. In this section, I present evidence that horizontal equity actually does play this role in practice. First, taxpayers tend to view more horizontally equitable policies as more legitimate, which makes voters more willing to support taxes and taxpayers less likely to evade them. Second, successful tax reform efforts in the past have used the goal of horizontal equity as a focal point for compromise and as a tool to build the support necessary to overcome opposition from those who benefit from tax inequities.

Like many other social institutions, tax collection relies on a high degree of voluntary compliance, without which the sheer volume of opportunistic law-breaking would overwhelm the ability of authorities to detect and punish violations of the law. For this reason, tax morale—the willingness of taxpayers to comply with the law for reasons other than the fear of formal sanctions—is crucially important. Tax morale is sensitive to a range of factors including attitudes toward the state, ethical commitments, perceptions of tax fairness, perceptions of procedural fairness, perceptions of tax compliance by other taxpayers, and perceptions of influence over government policy. Many, if not most, taxpayers comply with tax laws voluntarily even when tax evasion might have positive expected value given the probability of audits and enforcement.77 Revenue collection would be far

77. Erich Kirchler explains that:

[A] large number of empirical studies . . . demonstrate that the majority of taxpayers are inherently honest and willing to pay their share. If taxpayers are unable to understand the complex tax law and seek help from tax practitioners, they do it with the goal of preparing a correct tax file rather than finding aggressive strategies to reduce their taxes within the legal scope.
lower if taxpayers complied only when the risk of punishment made it financially advantageous to do so.\textsuperscript{78} Taxpayers seem particularly sensitive to perceptions about whether others are complying with tax laws.\textsuperscript{79} For example, simply sending a letter to taxpayers citing high rates of tax compliance in their jurisdiction has been found to increase reported income both above baseline and in comparison with letters warning of possible audits.\textsuperscript{80}

Tax compliance behavior is difficult to model because taxpayers vary greatly in their response to different circumstances. It might be helpful to think of the general population as consisting of three types of taxpayers: (1) those disposed to follow the law under almost all circumstances; (2) taxpayers who will cheat whenever they think doing so is worth the risk in straightforward financial terms; and (3) taxpayers who pay or evade taxes based on a variety of contextual factors including their perceptions of the behavior of other taxpayers and their general views about the fairness and legitimacy of the tax system. The variability of tax compliance in response to factors other than punishment suggests that the third category is quite large. Therefore, the important question is whether horizontal equity has an important influence on this third type of taxpayer.

Although the results of laboratory experiments are not uniform, most studies have found that tax compliance increases with perceptions of horizontal equity and decreases when taxpayers perceive themselves to be treated differently from others who are similarly situated relative to the tax

\textsuperscript{78} Michael J. Graetz & Louis L. Wilde, \textit{The Economics of Tax Compliance: Fact and Fantasy}, 38 NAT’L TAX J. 355, 358 (1985) ("Application of the standard economic theory of crime to tax avoidance . . . produces an unambiguous prediction of behavior: throughout the 1970s \textit{no one} should have paid the taxes they owed . . . .").

\textsuperscript{79} Eric Posner, \textit{Law and Social Norms: the Case of Tax Compliance}, 86 Va. L. Rev. 1781, 1784 (2000) ("People are more likely to pay taxes if they believe that their friends and other citizens pay taxes.").

Experimental subjects respond differently to tax increases and decreases depending on whether they violate horizontal equity. One experiment found that tax increases that fall equally on all members of a group and preserve horizontal equity do not tend to reduce compliance. However, tax increases that fall inequitably on different groups of taxpayers and thus increase horizontal inequity lead to lower rates of tax compliance. It appears


82. Fortin et al., *Tax Evasion and Social Interactions*, supra note 81, at 2107.

We also find fairness effects in term of horizontal equity: for a given gross income and a given personal tax rate, the individual will report less when facing a reduction in the mean tax rate of his group. Perceived unfair taxation may thus lead to increased tax evasion. At the policy level this means that a taxation system that is more horizontally equitable is likely to improve tax compliance.


We find that, in the presence of horizontal inequity, subjects respond to an increase in exchange inequity (resulting from a tax-rate increase) by reporting less income . . . In contrast, in the presence of horizontal equity, subjects do not significantly change the amount of income they report as the tax rate increases. Subjects react less to the increase in exchange inequity associated with a tax-rate increase, apparently because they realize that all other taxpayers face the same tax-rate increase. Thus, in the presence of horizontal equity, the effect of the increased exchange inequity no longer dominates the effect of the economic incentives associated with a tax-rate increase.

Id.
that, at least in the laboratory, people do tend to perceive horizontally equitable tax schemes as more fair and that this influences their behavior. There is some evidence for this effect outside of the laboratory as well. Surveys of Dutch entrepreneurs found that perceptions of fairness, including horizontal equity, were unrelated to intentions to comply with tax law for entrepreneurs with strong general personal dispositions to follow laws and moral rules, but appeared to have a significant impact on entrepreneurs who lack this general disposition. There is reason for caution in extrapolating these results. Laboratory settings allow for precise manipulations of variables, but it is unclear to what extent they simulate the behavior of taxpayers outside the lab. Furthermore, the effect of horizontal equity depends on public understanding of the Code and this is generally quite poor. It is likely that horizontal equity enhances the legitimacy of the Code and improves tax morale. The magnitude of this effect is more difficult to gauge.

A somewhat speculative hypothesis about what explains this connection is that a substantial number of taxpayers are conditional cooperators. That is, they cooperate with the tax authorities if they think that others like them cooperate and that their tax burdens are relatively fair in light of what others like them pay. If not, they try to evade taxes. Almost nobody likes paying taxes, but most people realize that it is important to support public goods and are willing to do their part (albeit grudgingly, perhaps) if they are not singled out for especially burdensome treatment. Horizontal equity is important as a public signal that all taxpayers are making reasonable contributions to support public goods and tends to reassure taxpayers that they are not making grossly disproportionate sacrifices for the benefit of others. Reasonable contributions in this context, it should be emphasized, are not the same thing as whatever a taxpayer would require if she were to be able to


There is plenty of evidence that most people are conditional cooperators: They cooperate when they expect others to cooperate and defect otherwise. In other words, most people are neither pure altruists nor selfish brutes: They rather tend to condition their choices on what they expect other choosers to do, and, in cases in which such choices have a cost, they also take into account what others expect them to do.

Id.
unilaterally determine the tax laws.\(^{87}\) For conditional cooperators, avoiding results that leave some taxpayers feeling taken advantage of is more important than achieving results that are ideally fair. After all, most people do not have detailed views about ideal tax rates, deductions, and credits. However, they do tend to care when others do not do their part to support public goods. Free riders are never popular.\(^{88}\) If this hypothesis about the significance of horizontal equity is correct, it provides reason to favor taxes that are politically salient, at least when the Code is relatively horizontally equitable.\(^{89}\) For horizontal equity to function as a signal of tax fairness, taxpayers must be cognizant of at least the approximate structure and effect of the tax.

Perhaps even more important than its role in legitimating taxation is horizontal equity’s role as a focal point for bargaining. Experience with comprehensive tax reform suggests that horizontal equity is an attractive compromise principle for ideologically disparate factions. The most important tax legislation in the United States during the past fifty years is the 1986 Tax Reform Act. Passage of the 1986 Act surprised most observers (including the special interest lobbyists whose job it was to stop it).\(^{90}\) The reform reflected a

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\(^{87}\) And even in a horizontally equitable tax scheme, views about vertical equity may lead to some taxpayers regarding the Code as unfair.

\(^{88}\) Evidence from experimental economics suggests that perceptions of free riding on the part of others have a pronounced negative effect on contributions to public goods. When given the opportunity to do so, people often are willing to sacrifice money to punish those who free ride in public goods games. The threat of punishment is often effective in maintaining high levels of contribution, but only in populations in which punishment of free riders is seen as legitimate. Conversely, when punishment of free riders is seen as illegitimate, it can backfire. See generally Samuel Bowles & Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* 22–32 (2013). This psychology of “conditional cooperation” also has interesting implications for welfare policy. See Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 Law & Contemp. Probs. 257 (2000).

\(^{89}\) David Gamage and Darien Shanske distinguish between economic salience and political salience. David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 Tax L. Rev. 19, 24 (2011). The former relates to the impact of taxes on market behavior whereas the latter relates to their impact on political behavior. Gamage and Shanske are skeptical of arguments that democratic values provide reason to favor more politically salient taxes. Insofar as horizontal equity functions effectively as a signal of tax fairness, this provides an alternative justification for increasing political salience at least when taxes are relatively horizontally equitable. For example, income taxes might be preferable to VAT taxes in this respect.

\(^{90}\) Prior to the 1986 Act, there was widespread pessimism about the prospects for reform. For example, in 1984, Michael Graetz wrote:
very simple general policy: elimination of exemptions, deductions, and credits expanded the tax base in order to finance the reduction of tax rates. This allowed both President Reagan and congressional Democrats to claim important victories. Reagan achieved a major goal in lowering tax rates in a context in which significant budget deficits made it very difficult to secure support for policies that would decrease tax revenue. Liberal reformers were able to close a large number of loopholes that mainly benefited large businesses and wealthy individuals. The reform was roughly revenue neutral, which meant that neither conservatives nor liberals could claim victory in their ongoing battle over the size of the federal government. Although elite opinion was squarely behind the reform, its improbable passage required overcoming opposition from the numerous interest groups that benefited from the pre-1986 Code.91

Horizontal equity was an explicit aim of the 1986 Act. Conlon, Wrightson, and Beam note that:

[B]y the mid-1980s, most experts—including those within government—were in agreement on basic principles. According to the consensus, an ideal income tax should be horizontally equitable; it should be investment-neutral; and it should be administratively efficient. All three goals could be obtained by broadening the tax base and lowering rates.92

Joseph Pechman, whose advocacy of tax reform provided much of the intellectual ballast, argued that reducing horizontal inequities should be a key

[P]rospects for structural tax reform have been dimmed by recent “reforms” in congressional practices; public pressure to enact income tax reforms seems nonexistent; political leadership on tax matters has become increasingly diffuse; committee deliberations are now open to the public and are well attended by representatives of groups with a special interest in the outcome; and political action committees now have great influence in guiding policy decisions. In short, for those who would urge massive tax reforms, there is more than ample cause for despair.

Michael J. Graetz, Can the Income Tax Continue to be the Major Revenue Source? in OPTIONS FOR TAX REFORM 39, 42 (Joseph Pechman ed., 1984).


objective of any comprehensive tax reform.93 In a 1982 speech proposing what became the basic framework for the 1986 tax reform, the reform’s key legislative architect, Senator Bill Bradley, advocated “a tax code in which all citizens with equal incomes are treated essentially the same way.”94 Thus, horizontal equity played two roles in the 1986 tax reform. First, it provided a focal point for compromise between a conservative White House and a more liberal Congress. Second, it provided an intuitive conception of tax fairness that was used to publicly justify the reform. Despite disagreements about the effects of the final reform package, even skeptics acknowledge that it did make some progress toward greater horizontal equity.95 In any case, the reform appears to have improved public impressions of the Code. Survey data from the late 1980s suggests that citizens viewed the Code as more fair after the 1986 reform and were more willing to comply with tax law as a result.96

This experience is not unique. Horizontal equity was a key goal of successful tax reform in Australia, Canada, and New Zealand.97 Equitable treatment of different types of income was crucial for the successful introduction of income taxation in nineteenth century Great Britain. Robert Peel, who reestablished the income tax in 1841, was partially motivated by the promise of establishing “a sense of equity between different types of wealth and income.”98 Peel’s calculation appears to have been correct: the British state was able to raise more revenue with less political opposition in comparison both with its rivals on the continent and with its prior system of public

94. BIRNBAUM & MURRAY, SHOWDOWN AT GUCCI GULCH, supra note 91, at 23.
95. E.g., Michael Graetz wrote:

I would agree that the real merits of this legislation must be located in its improvements in tax equity, particularly in its promotion of greater ‘horizontal equity’ among taxpayers—the idea that people with similar incomes should pay similar amounts of tax. Once again, however, the achievements of the 1986 Act seem to have been exaggerated.

97. CEDRIC SANDFORD, SUCCESSFUL TAX REFORM: LESSONS FROM AN ANALYSIS OF TAX REFORM IN SIX COUNTRIES 66, 73–74, 100–01, 154, 163 (1993).
finance. The broader lesson is that tax policies that observe horizontal and vertical equity build public trust in the tax system and thus can help to create the conditions necessary for public support of social welfare spending and public investment.

VI. CONCLUSION

Concern with horizontal equity may, at first blush, appear to be irrational if one rejects natural rights or moral desert accounts of property rights because it accords normative weight to market outcomes that have no particular moral significance. In a world with broad agreement on the normative and empirical questions germane to tax policy and a political system strong enough to implement the policies that this consensus implies, it would be sensible to determine taxes by considering the effects of various policies rather than their relation to patterns of pre-tax income. Under conditions of pervasive disagreement about relevant moral or factual matters, however, norms of tax fairness can play a valuable role in preventing disagreements about distributive questions from unsettling relative property entitlements fixed by private law. Proponents of differing ideologies can agree that it is desirable to avoid a wasteful patchwork of taxes and tax subsidies at any level of redistribution. Horizontal equity is best understood as requiring a sort of procedural fairness in allocating obligations to contribute to public goods. It provides a partial solution to the problem of how to assign tax obligations in the same way that “everyone gets to keep what they possess” provides a partial solution to the problem of control over resources. Because they appeal to long-run interests of all parties, tax fairness norms can enable cooperation between persons with conflicting interests or differing values.

This account of tax fairness shows why use of pre-tax income as a normative baseline is defensible even if one does not accept a natural rights theory of property. Preserving the relative holdings of similarly situated property owners constrains public policy in ways that are in the long-run interest of all citizens. Egalitarians can recognize this point without compromising their commitment to redistributive taxation because horizontal equity limits horizontal redistribution while leaving entirely open the question of how much downward distribution is appropriate. Conventional accounts of property rights and fairness norms thus provide a powerful rejoinder to Murphy and Nagel’s claim that horizontal equity is a manifestation of the “myth of ownership.”

My defense of horizontal equity as a norm of conventional fairness is a modest one. It does not deny that there is also a role for more ambitious theories of just taxation including egalitarian theories of the sort endorsed by Murphy and Nagel or utilitarian theories of the sort endorsed by Louis Kaplow.

99. Id. at 141–42.
It is consistent with my theory that if someone has the power to enact a complete set of tax laws, that person might ignore horizontal and vertical equity in favor of her favorite comprehensive theory of justice. One can endorse horizontal equity as a principle of non-ideal tax fairness while remaining a utilitarian, a Rawlsian, or a neo-Lockean on the level of ideal theory. Even if horizontal equity is a useful principle of fairness under some circumstances, this does not necessarily mean that it is the only way to constrain opportunistic use of the power to tax or to secure compromise over tax policy. I have not considered alternative means of constraining systems of taxation to prevent wasteful resource conflict. However, given the difficulties of enacting tax reform against a background of pervasive ideological discord and a foreground of well-organized special interests, we need all the tools that we can get. Horizontal equity is defensible as a matter of principle and, if not dismissed as simple-minded or outdated, could once again play an important role in improving our system of taxation.

100. One approach, advocated by James Buchanan, uses a unanimity rule to guarantee adoption of a package of taxes and spending measures that leaves all taxpayers better off. See generally JAMES M. BUCHANAN, THE LIMITS OF LIBERTY 46–68 (1975). This approach has the advantage of including both taxation and public expenditure in the same analytical framework. It tends, however, to be hostile to redistributive taxation and thus is far more ideologically fraught than the more modest principle of horizontal equity defended here. And, in any case, it is unclear how to implement policies approximating the unanimity criterion in a way that preserves its virtues without allowing irrational holdouts or hardball negotiators to block essential spending.