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CONSTRAINED INCOME REDISTRIBUTION AND INEQUALITY: LEGAL RULES
COMPARED TO TAXES AND TRANSFERS

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ABSTRACT

A widely accepted result, associated with Louis Kaplow and Steve Shavell, is that it is more costly to use legal rules to redistribute income than to use the tax and transfer system (the income-tax only result). An assumption behind this result is that if a legal rule is changed to eliminate its income-redistributive effects, the tax and transfer system can be adjusted to counteract the effects of those changes on the distribution of income. A number of commentators have questioned this assumption, suggesting that political constraints may limit the ability of the tax and transfer system to adjust to changes in legal rules. They conclude that legal rules should sometimes, or always, be designed to redistribute income. Building on this critique, this paper considers how adding political constraints on redistribution changes the income-tax only result. After examining what we know about the effectiveness of the tax and transfer system in redistributing income, the paper considers a political constraints that limit adjustments to the tax and transfer system, in each case examining the implications for the income-tax only result. It concludes that adding political constraints strengthens rather than weakens the result. There are two key considerations. First, legal rules may be regressive as well as progressive. To the extent that the wealthy control the political system and seek to redistribute wealth upwards, allowing the use of legal rules may make it easier for the wealthy to do so because redistribution using legal rules is less transparent than redistribution via the tax system. Second, allowing the use of legal rules to redistribute may lead to tit-for-tax strategies when coalitions change, with coalitions that favor less redistribution enacting regressive legal rules and coalitions that favor more redistribution enacting progressive legal rules. The net result is a loss in the effectiveness of legal rules with unclear effects on the distribution of income. The income-tax only approach mitigates this effect.

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By some measures, income inequality is at levels not seen since the days of the robber barons, with the wealthy capturing an overwhelming share of our nation's output.¹ Inequality at this level is thought to cause a variety of harms, including distortions to the political process,² lower income growth for middle and lower class households,³ lower overall growth levels,⁴ reduced mobility,⁵ lower social cohesion,⁶ and worse health outcomes.⁷ For these and other reasons, many people view income inequality as one of the central problems facing the United States.⁸

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- ¹ See Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 68 QUARTERLY JOURNAL OF ECONOMICS 1 (2003).
- ² Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age - Second Edition* (2016).
- ³ Paul Krugman, *Why We're in a New Gilded Age*, 2014.
- ⁴ Abhijit V. Banerjee & Esther Duflo, *Inequality and Growth: What Can the Data Say?*, 8 JOURNAL OF ECONOMIC GROWTH 267 (2003).
- ⁵ Alexander S. Browman et al., *How economic inequality shapes mobility expectations and behaviour in disadvantaged youth*, 3 NAT HUM BEHAV 214 (2019).
- ⁶ Robert Andersen, *Support for democracy in cross-national perspective: The detrimental effect of economic inequality*, 30 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 389 (2012); Robert Andersen & Tina Fetner, *Economic Inequality and Intolerance: Attitudes toward Homosexuality in 35 Democracies*, 52 AMERICAN JOURNAL OF POLITICAL SCIENCE 942 (2008).
- ⁷ Pravin Matthew & Donka Mirtcheva Brodersen, *Income inequality and health outcomes in the United States: An empirical analysis*, 55 THE SOCIAL SCIENCE JOURNAL 432 (2018).
- ⁸ See, e.g., Emmanuel Saez & Gabriel Zucman, *The Triumph of Injustice* (2019); Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2012); George Packer, *The Broken Contract - Inequality and American Decline Essay*, 90 Foreign Aff. 20 (2011); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics; Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*,

A central question for both law and policy is what to do to address rising income inequality. To the extent we believe that inequality is one of the most important problems facing our society, it is tempting to use all possible solutions, in the words of one scholar, to seek “a thousand points of equity.”⁹ This approach would include, notably, shifting legal rules away from the content they might otherwise have (e.g., their efficient or their otherwise fair content) to make them redistributive. For example, we might make tort damages or levels of care dependent on income, enforce antitrust rules more vigorously when the harms are to poor consumers, or limit otherwise desirable immigration if it helps the rich. Contract enforcement might take the income levels of the parties into account. Perhaps the poor could be allowed to infringe in intellectual property rights (or real property rights) held by the rich. The possibilities for attacking inequality using legal rules are endless.

In a series of articles, however, Steven Shavell and Louis Kaplow argued against this approach. Legal rules, they argued, should not be used to redistribute income. Instead, we should use the tax and transfer system to redistribute income, which, they argue, can do so more effectively.¹⁰ Although

38 *Politics & Society* 152 (2010); Robert H. Frank & Philip J. Cook, *The Winner-Tax-All Society* (1995); Richard Wilkinson & Kate Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (2011).

⁹ Zachary D. Liscow, *Redistribution for Realists*, 107 *IOWA L. REV.* 495 (2022).

¹⁰ Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 *THE JOURNAL OF LEGAL STUDIES* 667 (1994); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 *THE JOURNAL OF LEGAL STUDIES* 821 (2000); Steven Shavell, *A Note of Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 *THE AMERICAN ECONOMIC REVIEW* 414 (1981). For related literature and more general proofs, see Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 *THE SCANDINAVIAN JOURNAL OF ECONOMICS* 264 (1979); Louis Kaplow, *Public goods and the distribution of income*, 50 *EUROPEAN ECONOMIC REVIEW* 1627 (2006); Louis Kaplow, *On the (Ir)Relevance of Distribution and Labor Supply Distortion to*

a number of scholars have raised criticisms,¹¹ the argument, sometimes referred to as the “income-tax only argument,” is now accepted as the standard wisdom in economic approaches to law.¹²

In the last several years, a number of commentators have raised a new criticism of the income-tax only argument. The key claim made by these commentators is that the political (as opposed to legal or economic) assumptions in the income-tax only argument are not realistic. In particular, the income-tax only argument requires the tax and transfer system to be

Government Policy, 18 JOURNAL OF ECONOMIC PERSPECTIVES 159 (2004); Louis Kaplow, On the undesirability of commodity taxation even when income taxation is not optimal, 90 JOURNAL OF PUBLIC ECONOMICS 1235 (2006); LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS (2008); Louis Kaplow, Taxing Leisure Complements, 48 ECONOMIC INQUIRY 1065 (2010); By Louis Kaplow, Optimal Control of Externalities in the Presence of Income Taxation*, 53 INTERNATIONAL ECONOMIC REVIEW 487 (2012); David A. Weisbach, Should Legal Rules Be Used to Redistribute Income?, 70 THE UNIVERSITY OF CHICAGO LAW REVIEW 439 (2003); David A Weisbach, Daniel J. Hemel & Jennifer Nou, The Marginal Revenue Rule in Cost-Benefit Analysis, 160 TAX NOTES 1507 (2018).

¹¹ See, e.g., Christine Jolls, Behavioral Economics Analysis of Redistributive Legal Rules Symposium: The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law, 51 VAND. L. REV. 1653 (1998); Kyle Logue & Ronen Avraham, Redistribution Optimally: Of Tax Rules, Legal Rules, and Insurance, 56 TAX L. REV. 157 (2002); Ronen Avraham, David Fortus & Kyle Logue, Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow and Shavell, 89 IOWA L. REV. 1125 (2003); Richard S. Markovits, Why Kaplow and Shavell’s Double-Distortion Argument Articles Are Wrong, 13 GEO. MASON L. REV. 511 (2004); Tomer Blumkin & Yoram Margalioth, On the Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules, 25 VA. TAX REV. 1 (2005); Daphna Lewinsohn-Zamir, In Defense of Redistribution through Private Law, 91 MINN. L. REV. 326 (2006); Richard L. Revesz, Regulation and Distribution, 93 N.Y.U. L. REV. 1489 (2018). These articles raise a number of issues that are beyond the scope of the analysis here.

¹² See Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2015) n.32 (arguing that the income-tax only argument is the standard wisdom and collecting sources).

sufficiently flexible and responsive that redistribution via legal rules is not necessary. (I will describe the precise nature of this requirement below.) These commentators argue that redistribution through the tax and transfer system is limited because of political constraints and, therefore, does not meet the flexibility requirement. That is, in theory the tax and transfer system has sufficient flexibility but in practice, in the actual political environment we live in, it does not. As a result, a precondition for the income-tax only argument to apply is not met. We should, therefore, reject the income tax only argument and seek to address income inequality by using redistributive legal rules.

Lee Fennell and Richard McAdams were the first to make this argument. They argue that there are costs to enacting all legislation, including tax legislation. These political transactions costs, to make an analogy to Coase, make the tax and transfer system insufficiently flexible to meet the requirements of the income-tax only argument.¹³ That is, Fennell and McAdams view the income-tax only argument as a Coasean argument that illustrate possibility in the absence of transactions costs. Actual policy, however, needs to take transactions costs into account.

Several years later, Alex Raskolnikov surveyed a broad swath of legal changes since around 1990 and concluded that many had had distributive effects. The income tax system, however, was not adjusted to offset these effects.¹⁴ Like Fennell and McAdams, Raskolnikov concludes that the tax and transfer system is not sufficiently flexible to meet the requirements of the income-tax only argument.

Finally, Zachary Liscow makes arguments similar to Fennell and McAdams. Rather than relying on political transactions costs, however, Liscow relies on surveys and experimental evidence of individual preferences

¹³ Fennell and McAdams, *supra* note 3.

¹⁴ Alex Raskolnikov, *Distributional Arguments, in Reverse*, 105 MINN. L. REV. 1583 (2020).

regarding methods of redistribution.¹⁵ He argues that people prefer redistributing through legal rules, and as a result, the tax system lacks the necessary flexibility to meet the requirements of the income tax only argument. We should, therefore, use legal rules to address income inequality.

These authors (collectively, the critics) conclude that legal rules *should* be used to redistribute income, depending on the critic, either some of the time or all of the time. They suggest that the income-tax only conclusion should be “reversed”¹⁶ and its assumptions “inverted”¹⁷ in light of the political realities of addressing income inequality. Redistribution must be realistic, not done only in theory.¹⁸

My goal in this essay is to explore this criticism of the income-tax only argument. This criticism puts politics into Kaplow and Shavell’s largely institution-free approach.¹⁹ The question is, to what extent, if at all, does the income-tax only argument survive once we add politics?²⁰

¹⁵ Liscow, *supra* note 10.

¹⁶ Raskolnikov, *supra* note 6.

¹⁷ Lee Anne Fennell & Richard H. McAdams, *Inversion Aversion*, 86 THE UNIVERSITY OF CHICAGO LAW REVIEW 797 (2019) (the assumption of distributive invariance should be inverted).

¹⁸ Liscow, *supra* note 10.

¹⁹ Kaplow and Shavell have an implicit institutional story, and that story was most likely not chosen without thought. As we will see, the implicit institutional setting is quite robust. Nevertheless, they have no explicit political institutions in their models.

²⁰ Academics reflecting a preference for fancy words, often call politics “political economy.” I will use “politics.” Feel free to substitute “political economy” in appropriate places.

To answer this question, I start, in Part I, with a brief overview of the income-tax only argument. The argument should be relatively familiar to most readers, but understanding precisely what it assumes is important. In particular, we need to know precisely what the income-tax only argument requires of the tax and transfer system because that is the focus of the critics' arguments.

Part I then looks at the available data the tax and transfer system, focusing on the United States. The critics argue that the tax and transfer system is not sufficiently flexible to meet the requirements of the income-tax only argument, but they do not provide any data on the operation of the tax and transfer system. The first step in evaluating their argument is a close look at how the tax and transfer system operates.

In fact, the tax and transfer system is extremely flexible and is changed all the time. For example, according to independent estimates, in the last 40 years (from 1980 to 2019), there have been 62 *major* pieces of enacted tax legislation or more than 1.5 each year.²¹ Adding minor changes to the tax system and all of the changes to the transfer system (as opposed to just the tax system) would increase the average further. Adding regulatory changes would further increase the number of changes each year. All of these changes have added up to a tax and transfer system that is markedly more progressive than it was at the beginning of that period. Although it has not fully offset changes in pre-tax and transfer income inequality in the United States over the last 40 years, it has offset a substantial portion.

While I believe these data refute the claim that the tax and transfer system is not sufficiently flexible to meet the requirements of the income tax only argument, there are enough problems with interpreting the data that we

²¹ The Urban Institute and Brookings Institution's Tax Policy Center has a list of major enacted tax legislation. Counting the items they list from 1980 to 2019 gives us 62 major pieces of enacted tax legislation. See <https://www.taxpolicycenter.org/laws-proposals>

cannot definitely conclude that it is. A key problem is that we cannot connect changes to the tax and transfer system to changes in individual legal rules, which, as will be discussed, is how the income-tax only argument is constructed. Instead, we only see periodic changes to the tax and transfer system that respond (to the extent it does) to aggregate changes in inequality caused by many factors. There is no simple way to interpret the aggregate data to ensure that the requirements of the income-tax only argument are met. As a result, the best view on whether the tax and transfer system is, in practice, sufficiently flexible is epistemic modesty: while the data establish a baseline presumption that the tax and transfer system is sufficiently flexible to meet the requirements of the income tax only argument, there is sufficient uncertainty that we cannot know this with certainty.

Part II assumes, contrary to my best reading of the evidence, that the tax and transfer system is not sufficiently flexible to meet the requirements of the income-tax only argument, and considers the implications. It shows: (1) that once we allow distributive preferences to be incorporated into legal rules, legal rules can be regressive as well as progressive and in fact they are more likely to be regressive; (2) the costs of using legal rules to redistribute may be much higher, indeed orders of magnitude higher, than the income-tax only argument suggests; and (3) that current institutions are not well-designed to promote redistribution through legal rules but are for the tax and transfer system.

The conclusion from the analysis in Part II is that even if the tax and transfer were not sufficiently flexible to meet the requirements of the income-tax only argument, it would still be a bad idea to try to use legal rules to address distributive concerns. We are more likely to get costly and regressive legal rules than we are to get well-designed, effective legal rules that reduce inequality. Combining Parts I and II, it is hard to see the case for preferring the use of legal rules to address inequality instead of the tax and transfer system. Indeed, the more one cares about inequality, the less one should want to use inferior tools, such as legal rules, to address the problem.

An important caveat to this conclusion is that the analysis in both parts of this essay depends on the current institutional structure in the United States. Institutional structures, including the flexibility of the tax system and the design and operation of legal rules varies over time and place. We can imagine a country with a constitution that bans redistributive taxes, in which case the analysis and conclusions would be different. Once we are considering institutional structures, we are no longer in a world of theorems. Nevertheless, the conclusions here are robust in the sense that the institutions analyzed here are long-standing and seem to change only slowly.

I. BACKGROUND

A. The income-tax only argument.

The income-tax only argument has been widely discussed in the literature, so I provide only a brief overview here.²² My focus is on the assumptions about the tax and transfer system.

Consider a legal rule that deviates from its otherwise desirable content because it attempts to redistribute income. The literature, following the example used in the original Kaplow and Shavell paper, often considers a tort rule that adjusts damages based on the income of the injurer. For example, rather than making all injurers pay damages equal to the harm they caused,

²² Note that many descriptions of the income-tax only argument are inaccurate. In particular, descriptions that claim it relies on a so-called “double distortion” are not accurate. See, e.g., David Gamage, *On Double-Distortion Arguments, Distribution Policy, and the Optimal Choice of Tax Instruments*, 106 PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION ANNUAL CONFERENCE ON TAXATION (2014), <https://papers.ssrn.com/abstract=2489678> (last visited Dec 23, 2022); Richard S. Markovits, *Why Kaplow and Shavell’s Double-Distortion Argument Articles Are Wrong*, 13 GEO. MASON L. REV. 511 (2004). While in some sense the double distortion explanation gives the intuition for the argument, the formal claim does not rely on counting distortions. As a result, criticisms of the argument that build on double distortions are inapt.

rich injurers might be forced to pay damages equal to twice the harm they caused, and poor injurers half. The rule is inefficient because rich people would take excessive care and poor people would take too little care, but it might²³ redistribute income from the rich to the poor.

Suppose we replace that tort rule with an efficient tort rule in which all injurers pay damages equal to the harm that they caused (step 1). Care levels would adjust to be more efficient, increasing total resources. The change, however, would be regressive. To offset this regressivity, adjust the tax and transfer system so that the utility of individuals at each income level is held constant (step 2). Because utility is held constant at each income level, nobody is made worse off.²⁴ Moreover, the progressivity of the combined tax and legal system would not change, which means that any disincentives caused by that progressivity, most importantly work incentives, would not change. That is, the level and the costs of redistribution are held fixed by the combination of steps 1 and 2. Because the tort system is now more efficient, however, total resources have increased. Utility for each individual is, by construction, held constant, which means that the increase in total resources must have been captured by the government through the changes to the tax and transfer system. The government can refund those resources as appropriate to make at least one person, and possibly everyone, better off (step 3). The net effect of the three steps is, therefore, a Pareto improvement. The conclusion is that legal rules should not be used to redistribute income. Instead, the tax and transfer system can do so more effectively.

²³ There are all kinds of reasons why this might not be true. For example, the redistributive effects also depend on who the victims are. Effects will also depend on how the rule affects victim care levels. One problem, discussed below, is that a judge, faced with a single tort case, would not have any idea of these broader issues.

²⁴ This assumes that at any given income level, all people are similarly situated regarding the tort system. That is, there is no within-income-class heterogeneity. Within income class heterogeneity can be important but is not an issue raised by the critics.

The focus of the critics' concerns is on step 2, the change to the tax and transfer system that offsets the shift to the more efficient tort or other legal rule. To generate a Pareto improvement, the tax and transfer system must adjust to offset the changes in the distribution of income caused by the shift to the more efficient tort system. Without an adjustment to the tax and transfer system, the change to the tort system would make the system more efficient at the cost of a change in the distribution of income. We do not know without more analysis whether that trade-off is desirable. The costs of less efficient tort system might be worth bearing to get the distributive benefits.

In the Introduction, I called step 2 a flexibility requirement. Fennell and McAdams call step 2 "distributive invariance."²⁵ The tax and transfer system must be sufficiently flexible and responsive that it can adjust to the change in the tort system or a change in some other legal rule to hold utility constant or invariant.

I do not believe any of the critics dispute that at least in theory the tax and transfer system can adjust. That is, there are no inherent limitations to the tax system and the transfer system that prevents the adjustments described in step 2. Instead, the critics all claim that in practice, the tax and transfer system does not adjust. To understand whether that is true, we need to look at the data.

B. A peek at the data

The critics all explicitly claim that the tax system does not adjust to offset the distributive effects of legal rules. Zach Liscow, for example, claims that "while [the income tax only argument] makes sense in theory, it fails in practice"²⁶ Fennell and McAdams ask us to "consider *the fact* that the tax and transfer system has not generally adjusted over time to correct for changes" in

²⁵ Fennell and McAdams, *supra* note 10 at 1057–1059.

²⁶ Liscow, *supra* note 10 at 499.

legal rules.²⁷ And the entire point of Raskolnikov's article is that the tax system has not adjusted to the changes to legal rules that he highlights.

The data on the tax and transfer system over the last 40 years, however, does not support the critics' claim. There is no way to look at the data on how the tax and transfer system has changed over time to support their conclusions. On the other hand, for reasons I will suggest, we cannot confirm the opposite, that the tax and transfer system has adjusted in the ways required by the income tax only argument. While the data suggest that there are good reasons to think it might have done so, there are problems with interpreting the data that preclude firm conclusions.

The place to start is with data on how often the tax system changes. If it is to be responsive to changes on legal rules, it must change regularly because legal rules change all the time.

In fact, the income tax and the transfer system changes with great frequency. As noted, according to the Urban-Brookings Tax Policy Center, in the 40-year period between 1980 and 2019, there were 62 major income tax laws passed by Congress. Each of these laws contained dozens or even hundreds of individual changes to the tax system. Most, and possibly all of

²⁷ Fennell and McAdams, *supra* note 13 at 1079 (emphasis added). Fennell and McAdams's precise claim is that the tax and transfer system has not adjusted to changes in the national income distribution. As will be discussed, this is irrelevant. It is not what the income tax only argument requires. I've modified their claim in the text to the narrower and relevant requirement. Because they make the broader claim, it should be appropriate to also suggest that they make the narrower claim.

Raskolnikov also argues that the tax system does not adjust to respond to legal rules. Raskolnikov, *supra* note 15 at 1624 ("Part II revealed that a wide range of national policies likely created unintended burdens. This part shows that the U.S. government did little to mitigate them.").

these hundreds of changes to the tax system have distributive effects.²⁸ Some of these laws involved major rewrites of the tax system, rewrites that changed much of its basic structure.

This count does not include changes to the transfer system such as the Welfare Reform Act of 1996 or the Affordable Care Act (enacted in 2009). And it does not include regulatory changes to the tax system or the transfer system. Combined, the tax and transfer system is adjusted multiple times each year.

While the details of the tax legislative process have varied over that 40-year period, one constant is the importance of the distributional effects of a change. Each tax bill is accompanied by what is known as a distributional table. These tables are prepared by the professional staffs in the executive branch or on Capitol Hill, and show the impact of a proposed law on different income classes (discussed more in Part IIB). As Michael Graetz stated in 1995, distributional tables, along with revenue estimates are “outcome-determinative.”²⁹ This remains true today. Distributional tables are central elements in congressional choices during tax legislation.

Given all of these changes, what has happened to the overall progressivity of the tax and transfer system during this period?³⁰ There is a folk theorem that

²⁸ Note that this is true even if the change didn’t affect the rate structure. Changes to the tax base can have as profound distributive effects as changes to the nominal rates.

²⁹ Michael Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUMBIA LAW REVIEW 609, 612 (1995).

³⁰ I offer here only a brief overview of the data. In other work with Tom Coleman, I collect and compare all recent estimates of the change in the redistributive effects of the tax and transfer system in the recent (35-60 year) past. See Thomas Coleman and David Weisbach, *Tax and Transfer Progressivity and Redistribution over Time*, cite. We also look at a variety of ways of measuring the extent of redistribution. While there are some outliers and studies differ in their details, we show that there is remarkable consistency across studies. Consistent across most studies, we see a large increase in the extent of transfers to the bottom half of the population, with greater increases for those further down the

the tax system has become less progressive since the 1970's.³¹ Newspapers report it as fact,³² and numerous books and articles assume this to be true. I

distribution. Moreover, the majority of studies conclude that there have been substantial increases in the tax rates at the top. Almost all studies show an increase in tax and transfer progressivity and redistribution. The small number of outliers seemed to have attracted the most public attention, but most, and the best, studies show an increase in progressivity over time.

For alternative estimates that are roughly in line with Auten and Splinter, see Jesse Bricker et al., *Measuring Income and Wealth at the Top Using Administrative and Survey Data*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 261 (2016); Dennis Fixler, Marina Gindelsky & David Johnson, *Improving the Measure of the Distribution of Personal Income*, 109 AEA PAPERS AND PROCEEDINGS 302 (2019). A key outlier is Piketty, Saez, and Zucman, *supra* note 27 at 557.

³¹ One of the most prominent papers establishing the folk theorem of reduced progressivity and increasing inequality uses a narrow measure of income: taxable income. See Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998**, 118 THE QUARTERLY JOURNAL OF ECONOMICS 1 (2003); Thomas Piketty & Emmanuel Saez, *How Progressive is the U.S. Federal Tax System? A Historical and International Perspective*, 21 JOURNAL OF ECONOMIC PERSPECTIVES 3 (2007). This approach misses about 1/3 of national income and, therefore, is unreliable.

³² A prominent example was in The New York Times, which featured an article purporting to show that the tax system is not only less progressive than it was in the 1950's, but is actually regressive, with the rich facing lower rates than everyone else. David Leonhardt, *The Rich Really Do Pay Lower Taxes Than You*, NEW YORK TIMES, October 6, 2019. A more typical example, found in The New York Review of Books in June of 2022 and taken somewhat randomly is an article on the reform of securities laws that casually asserted that obscene concentrations of wealth are “chiefly due to reduced tax rates.” Jed S. Rakoff, *The Rich Get Richer*, THE NEW YORK REVIEW, 2022. Trade press books are based on the idea of a regressive, or at least a far less progressive, tax system. See STIGLITZ, *supra* note 9; TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT (2012); CHRYSIA FREELAND, PLUTOCRATS: THE RISE OF THE NEW GLOBAL SUPER-RICH AND THE FALL OF EVERYONE ELSE (2012); BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY (2017).

suspect that this folk theorem is the basis of the claims by the critics that the tax system does not adjust.³³

Estimating the extent that the tax and transfer system redistributes, however, turns out to be a surprising difficult task. Problems include how to account for changing household composition over time, how to estimate hidden income, such as income hidden by tax shelters, how to distribute indirect taxes, such as the corporate tax, and how to account for tax-deferred

³³ It is hard to determine the basis for the critics' claims because they do not present any comprehensive data. Liscow, who promises a rigorous economic analysis, has but a single sentence referring to the data on changes in U.S. inequality, and that single sentence cites only a single source, a source that is not widely recognized as authoritative. LISCOW, *supra* note 8 at 28. This more resembles rigor mortis than rigorous analysis.

Fennell and McAdams cite to changes in the after-tax U.S. Gini coefficient using the OECD estimation. Fennell and McAdams, *supra* note 3 at 1079. While helpful, as we will see, this is not a very good picture of changes in inequality in the United States. Raskolnikov studies many individual policies, but on aggregate data cites only to Fennell and McAdams. Raskolnikov, *supra* note 6 at 1635.

Raskolnikov does take a deep dive into economic studies showing unintended and detrimental effects of many legal changes. *Id.* at 1602–1624. Most of these changes, however, concern discrete sectors of the economy rather than overall income inequality. They concern heterogeneity within an income class, which is not addressed by the income-tax only argument. To the extent that they concern overall income inequality, looking only at the changes to the legal rules without the changes to the tax system, does not tell us aggregate effects.

Fennell and McAdams make the same mistake. They argue that because individuals and groups fight to win distributive fights, the invariance hypothesis must be false. Fennell and McAdams, *supra* note 3 at 1081. Why, after all, would a group fight for handouts if the handouts will them immediately be taken away by the tax system? But these lobbying efforts are for discrete sectors, such as public school teachers or users of crack cocaine (to cite two examples that they use). The fights are about heterogeneity within an income class. The income-tax only argument does not require or even suggest that these changes in who gets what would be offset by the tax system.

income, such as pensions. These seemingly technical problems can have large effects on the estimates. There is a sizable literature debating various problems and techniques for estimating the effects.³⁴

³⁴ The current technological frontier in estimating tax system progressivity and the extent of redistribution is to attempt allocate a reliable measure of all national income to individuals or households. See Piketty, Saez, and Zucman, *supra* note 32. This approach allocates to households the items we know with some certainty, such as taxable income, and then tries to make informed choices to attribute other items, such as military spending, corporate taxes, tax evasion, and pension income. Because these latter items involve judgments, the results can vary depending on the choices that are made. To illustrate the complex judgments involved, pension and other retirement savings can be allocated to (1) the individual at the time those amounts are earned; (2) over the time period between when they are earned and when they are withdrawn; or (3) when they are withdrawn. If they are allocated when earned, the analysis will show more inequality than if they are allocated when withdrawn because most individuals have more income during their earning years than during retirement.

The current state of the art on these issues is a paper by Gerald Auten and David Splinter.³⁵ Table 1 provides a summary of their results.³⁶ It shows the percent change in pre-tax income and after-tax and transfer income for the period between 1979 and 2014 for the entire U.S. economy and for selected subgroups. If there had been no change in a given measure (e.g., pre-tax income) during the 35-year period that is covered, the growth rate would be the same across all subgroups. Therefore, we can read across each line to see

³⁵ Gerald Auten and David Splinter, *Income Inequality in the United States: Using Tax Data to Measure Long-Term Trends*, forthcoming, *Journal of Political Economy* (2023), available at http://davidsplinter.com/AutenSplinter-Tax_Data_and_Inequality.pdf For short version that summarizes some of their results, see Gerald Auten & David Splinter, *Top 1 Percent Income Shares: Comparing Estimates Using Tax Data*, 109 *AEA PAPERS AND PROCEEDINGS* 307 (2019).

The Auten and Splinter results contrast in important ways with the results in Piketty, Saez, and Zucman, *supra* note 27. In their appendix, Auten and Splinter provide a step-by-step accounting of the differences in methodologies and the resulting differences in their measurements of inequality. Tax evasion accounts for about a third of the difference between Auten and Splinter's estimates and the Piketty, Saez, and Zucman estimates. By its nature, tax evasion is difficult to detect, which means that there will inevitably be substantial uncertainty on the amount and allocation of evaded income. Auten and Splinter use the IRS's random audit data to estimate and allocate evaded income to income classes while Piketty, Saez and Zucman allocate it on the basis of positive reported business income. Recent work using other methods of detecting evasion suggests that the IRS's random audit data may underestimate evasion at the top. See John Guyton, Patrick Langetieg, Daniel Reck, Max Risch, and Gabriel Zucman, *Tax Evasion at the Top of the Income Distribution: Theory and Evidence*, NBER Working Paper 28542 (March 3, 2021). For a response, see Gerald Auten and David Splinter, *Comment: Tax Evasion at the Top of the Income Distribution: Theory and Evidence*, working paper (August 15, 2021). This interchange indicates the difficulty with estimating inequality.

³⁶ Table 1 is from computations using the Auten and Splinter data found in Xi Song, Michael Lachanski & Thomas Coleman, *Three Myths About US Economic Inequality and Social Mobility*, 15 *CAPITALISM & SOCIETY* (2021), <https://papers.ssrn.com/abstract=3985601> (last visited Jun 17, 2022).

whether and how much income inequality grew for each measure over this time period.

Table 1: Growth in Real Per-Capita Income, 1979-2014

	Average	0-50th	50-90th	90-99th	Top 1%
Pre-tax/Pre-Transfer	70.9	26.9	63.3	93.2	157.1
Pre-tax/After-Transfer	80.2	58.5	71.2	95.7	156.8
After-tax and transfer	70.9	59.3	68.8	83.2	104.6

As can be seen, the growth in pre-tax income (top row) was highly skewed toward the top: as we move to the right, the growth rates get larger with the top 1% growing 157% during this period compared to only about 27% for the bottom half of households. Comparing the top line to the bottom line shows the extent to which the tax and transfer system moderates these effects. The tax and transfer system substantially reduces, but does not eliminate, the growth in inequality during that time. The growth rate for the bottom 50 percentile more than doubles because of taxes and transfers. The group between the 50th and 90th percentile stays roughly the same. The top 1% has its growth rate cut by a third. There is still an increase in inequality, but it is substantially muted by taxes and transfers. Moreover, the urban legend of the top 1% capturing all of the gains is false. There was substantial growth in the bottom and the middle percentiles.

The data just presented tells us the extent of current redistribution. It does not tell us how much redistribution has changed over time. Figure 1, which is taken from the same Auten and Splinter study provides that data. It shows the average rate of redistribution for difference income groups and time periods. The average rate of redistribution is effectively the difference between pre-tax and transfer and after-tax and transfer income, as a fraction of pre-tax and transfer income.

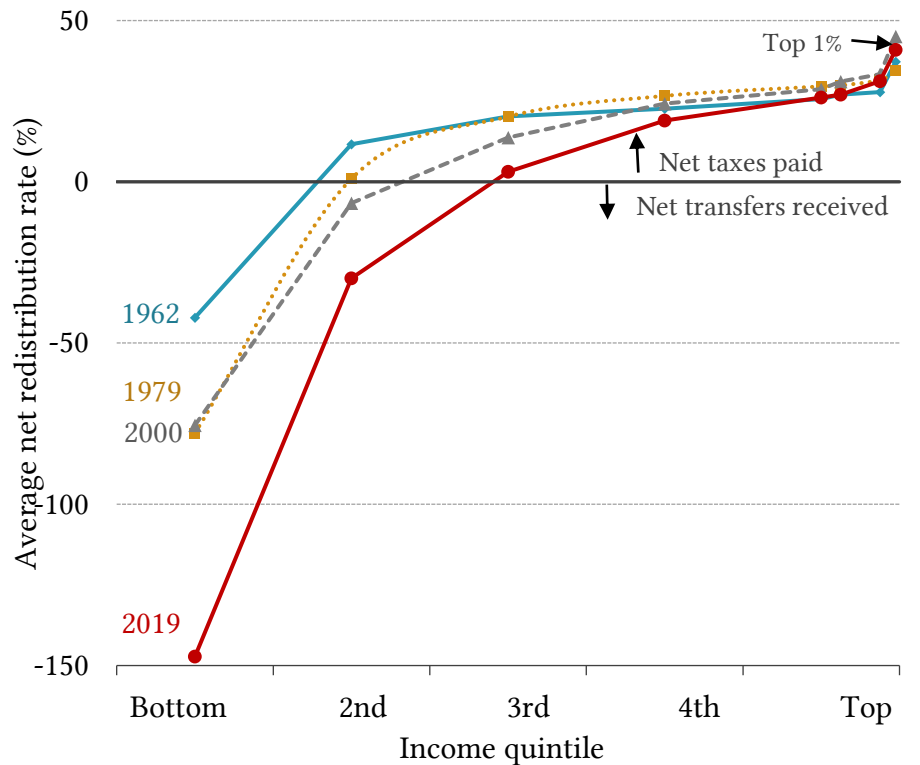
Looking at the bottom quintile, we can see that the average rate of redistribution increased dramatically from 1962 or 1979 (depending on when

we want to start counting)³⁷ to 2019, with a current average net tax rate of about negative 150%. That is, households in the bottom quintile now receive a net subsidy of about 150% of their earnings, compared to a net subsidy of about 75% in 1979. The data at the top are harder to see in this figure because they are compressed, but the underlying data show that the net tax rate at the top went up from 34.4% in 1979 to 40.9% in 2019, a modest increase. Other data from Auten and Splinter break down the top 1%, allowing us to see how the 0.1% and the 0.001% tax rates have changed. Focusing on the super-elite, the 0.001%, their net tax rate went up from 39.2% in 1979 to 48.1% in 2019, an increase of 23%.³⁸ Overall, tax rates at the top went up amount and tax rates at the bottom went down. The overall system has become much more progressive. Other studies using different methodologies confirm these results.³⁹

³⁷ We might want to exclude the 1962 series as that was before the redistribution from the Great Society. I think most of the concerns about the lack of tax system adjustment are about our more recent experience.

³⁸ Auten and Splinter, *supra* note 35.

³⁹ See Jesse Bricker et al., *Measuring Income and Wealth at the Top Using Administrative and Survey Data*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 261 (2016); Richard V. Burkhauser et al., *Recent Trends in Top Income Shares in the United States: Reconciling Estimates from March CPS and IRS Tax Return Data*, 94 THE REVIEW OF ECONOMICS AND STATISTICS 371 (2012); CONGRESSIONAL BUDGET OFFICE, *The Distribution of Household Income, 2019*, (2022), <https://www.cbo.gov/publication/58353> (last visited Dec 14, 2022); JAMES ELWELL, KEVIN CORINTH & RICHARD V. BURKHAUSER, *Income Growth and its Distribution from Eisenhower to Obama: The Growing Importance of In-Kind Transfers (1959-2016)*, (2019), <https://www.nber.org/papers/w26439> (last visited Jun 13, 2022).

Figure 1: Auten and Splinter estimates of redistribution over time

Combining these points, the tax and transfer system changes multiple times each year, each time with great attention to the distributive effects of these changes. And over time, as income inequality has increased, the tax and transfer system has redistributed more. I do not think a simple claim that the tax and transfer system does not adjust is consistent with the data.

On the other hand, it is difficult to say more than that. There are a number of difficult empirical challenges to confirming that the tax and transfer system has adjusted consistently with the income-tax only argument. An initial problem is that the model imagines a hypothetical set of changes, laid out as independent steps but we might not be able to observe the steps independently. In particular, notwithstanding Fennell and McAdams's claim, the income tax only argument does *not* require distributive invariance. The reason is that distributive invariance isolates a single step in a multi-step argument that in

reality would be compressed. Recall the three hypothetical steps: (1) a shift to an efficient legal rule; (2) a shift to the tax and transfer system to hold utility at each income level constant; and (3) distribution of the gains produced from steps 1 and 2. Step 2 requires invariance but actual government policy could, and likely would, combine and simultaneously implement steps 2 and 3. These two steps combined, which is what we would observe, need not hold the distribution of income fixed. For example, the government could distribute the Pareto-improving funds exclusively to the richest people, wildly increasing income inequality, and Kaplow and Shavell's argument would still be valid. That is, observing a tax and transfer system that, over time, seems to allow an increase in inequality is not inconsistent with the income-tax only argument.

In addition, while the income tax only argument considers a single, hypothetical legal rule and a corresponding tax change, in practice it would apply to the aggregate distributional effects of large groups of legal rules rather than the distributional effects of individual legal rules. In particular, in a country the size of the United States, there are thousands of legal changes every day, once one counts federal and state court decisions, decisions by other types of tribunals, administrative rulemakings, guidance documents, changes to statutes and municipal codes, and so forth. Each of these changes to the legal system potentially changes the distribution of income. If the tax and transfer system regularly adjusts to aggregate changes in legal rules rather than changing thousands of times per day, the income-tax only argument would be valid.

For example, suppose that a tort rule changes, transferring \$100 from the wealthy to the poor and, at the same moment, a contracts rule changes, transferring \$70 from the poor to the wealthy. We do not need separate \$100 and \$70 tax changes for the income-tax only argument to be true. A single tax change offsetting the net \$30 transfer from the wealthy to the poor due to these two legal changes would be sufficient. This means that we cannot expect to look at the data and find one-for-one changes to legal rules and changes to the tax system, which is how the model is framed. Instead, we should see aggregate

changes to the tax system to respond to aggregate net changes due to legal rules.

For the same reasons, we should look at legal changes over a reasonable period of time. If the tort law change and the contract law change hypothesized above happen reasonably close in time but not simultaneously, we should not expect the tax law to immediately and separately respond to each. We do not need the tax law to first make a \$100 transfer from the poor to the wealthy to offset the torts rule and then shortly thereafter make a \$70 transfer from the wealthy to the poor to offset the contracts rule. Instead, periodic tax law changes that respond to the aggregate effect of legal rules are sufficient. Once again, this means that we cannot use a simple tracing mechanism, lining up legal rules one-for-one with tax changes.

Finally, when looking at the data, we need to subtract changes to the distribution of income caused by factors other than legal rules, such as technological change or the rise of new trading partners such as China. Nothing in the income-tax only argument requires the tax system to offset distributive changes due to non-legal factors.

This is important because there are good reasons to believe that a substantial fraction of the change in inequality over the last 40 years has been due to non-legal factors such as technological changes that increase the returns to high-skilled labor⁴⁰ One piece of evidence is that changes in pre-tax wages

⁴⁰ The question of what has caused the change in pre-tax-income is the subject of much current research, in part because the answer is vital to determine which public policies best respond to inequality. We can crudely group the possibilities into two categories: (1) changes to legal rules such as deregulation, a stagnant minimum wage, laws governing unionization, immigration, trade laws, and so forth, increased the market power of rapacious employers, suppressing wages at the low end while increasing the returns to capital held by the rich, and (2) the demand for skills driven by technological change has outpaced the supply for skills, thereby increasing the price of high-skilled labor relative to low-skilled labor. If for example, the demand for workers with a college education goes up because of a change in technology, wages for those with a college education will go up

rates are skewed across the entire income spectrum.⁴¹ The highest earning brackets did better than the next highest, which did better than the third highest, and so forth. This fact is inconsistent with most, or all, explanations for the rise inequality based on changes to legal rules. For example, changes to unionization rules or the minimum wage would affect certain parts of the income distribution but not others rather than producing the pattern of changes we see in the data.

In addition to disaggregating changes in inequality due to legal rules and due to other facts, we have to subtract changes to the tax system that respond to the non-legal changes. Changes in the tax system that respond to inequality caused by changes in the economy do not count toward the income-tax only

until the supply of educated workers adjusts. Because the supply of educated workers changes only slowly—only a fraction of workers enter or leave the workforce each year—there can be long periods where technological change leads to an increase in inequality. This latter story is known as the Race between Education and Technology or RBET. See CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* (2010); Jan Tinbergen, *Substitution of Graduate by Other Labour*, 27 *KYKLOS* 217 (1974).

While there is surely an element of both and the debate among experts in the area is ongoing, there are reasons to believe that RBET is the central cause of the growth in inequality in pre-tax earnings. RBET is able to explain long run changes in earnings in the United States in ways that the legal rules story cannot. See Daron Acemoglu & David Autor, *What Does Human Capital Do? A Review of Goldin and Katz's The Race between Education and Technology*, 50 *JOURNAL OF ECONOMIC LITERATURE* 426 (2012). A more recent review of the RBET model, however, suggests that its explanatory power has been lower over the period from 2000 to 2017 than it was in previous periods. See David Autor, Claudia Goldin & Lawrence F. Katz, *Extending the Race between Education and Technology*, 110 *AEA PAPERS AND PROCEEDINGS* 347 (2020). This paper suggests that during the period between 2000 and 2017, within skill-group differences (e.g., wage differentials within the group of college graduates) became relatively more important.

⁴¹ Kevin M. Murphy & Robert Topel, *Human Capital Investment, Inequality, and Economic Growth*, 34 *JOURNAL OF LABOR ECONOMICS*: S99, S103 (2016) (Figure 1).

argument. Instead, we have to determine which changes to the tax system are due to legal rules.

There is no straightforward way to perform this latter task. When Congress changes the tax and transfer system, it is responding to the aggregation of all factors that determine the distribution of income (and other factors such as the effect of taxes on growth rates and savings). We cannot determine what fraction of the tax system responds to changes in inequality due to changes in legal rules.

These empirical challenges, taken together, are overwhelming. As a result, I think, overall, that we can conclude the following.

(1) The tax and transfer system changes multiple times a year, with great attention to the distributive effects of the changes. (And as will be discussed below, it is also institutionally designed to be able to take distributive effects into account.)

(2) The tax and transfer system has become substantially more progressive over the last 40 years at the same time that pre-tax income inequality has grown. Whether it does so sufficiently depends on one's views about the costs of inequality and the costs of reducing inequality, but the tax and transfer system cannot be dismissed out of hand as an ineffective tool that does not respond to increases in underlying inequality. Instead, the tax and transfer system seems to be highly responsive to underlying changes in equality.

(3) Nevertheless, there is no way to disaggregate the data to determine whether the tax and transfer system is in fact responding as required by the income-tax only argument. That is, it is not correct to say that the invariance hypothesis is false, at least without any modifiers. The data are more consistent

with it being true or mostly true. In the end, however, I think we simply do not know.⁴²

II. ANALYSIS

Let us assume that the uncertainty described in Part I is resolved, and we conclude that the tax and transfer system is limited in its ability to achieve the desired redistribution. That is, assume that the data supports the critics. The question of whether it is, as a result, a good idea to use legal rules to redistribute income.

I divide my analysis of this question into four parts. First, I consider what I will call the neutrality argument, namely that if legal rules can be used to increase redistribution they can also be used to reduce redistribution. They can be regressive. I will argue that in fact regressive legal rules are more likely than progressive ones. Second, I consider the costs of using legal rules to redistribute, arguing that these costs may be much higher than the income-tax only argument suggests. Third, I consider institutional expertise and argue that courts are uniquely ill suited to design redistributive legal rules. This part

⁴² A different claim regarding the invariance hypothesis is that it has to be false because it is based on false assumptions. In particular, Fennell and McAdams liken the invariance hypothesis to the Coase theorem in that both rely on the lack of transactions costs. Changing the tax system requires legislative action, which is costly, including the use of floor time in the legislature, developing the legislation, building a constituency to vote for the legislation, and so forth. These transactions costs mean that the tax system cannot immediately adjust to changes in legal rules. Rather than (just) being false in practice, the invariance hypothesis is false in theory.

There are a number of problems with this claim. A primary problem is that as noted the income-tax only argument does not require instantaneous changes to the tax system to offset each change in legal rules. The argument only requires periodic tax changes in response to aggregate changes in legal rules. Transactions costs do not, even in theory, prevent periodic changes to the tax system, and they certainly have not in practice.

concludes with a discussion of how, or whether, fairness considerations enter the analysis.

The analysis in this part necessarily depends on the current structure of institutions and our political system. If we were in the period between 1896 and 1913, when the income tax was unconstitutional in the United States, we might have little choice but to use other methods to redistribute, including possibly using legal rules, even if they do not work very well.⁴³ If, however, the tax and transfer system is good but not perfect at achieving the desired redistribution, the standard for using legal rules might be quite high. Similarly, our institutions could have an entirely different structure than they currently have. For example, courts could look more like agencies, staffed with experts to help judges evaluate arguments, and they could issue advisory opinions that look like regulations.

There is little hard and fast theory to making the sorts of judgments made in this section because the judgments depend on existing institutions. Nevertheless, the core structure of our institutions is stable, and, therefore, the analysis is not merely an analysis of the current, short moment.

A. Neutrality and the likelihood of regressive legal rules

The critics uniformly assume that relaxing the income-tax only result and giving legal decision makers the ability to redistribute would mean more redistribution and more progressivity. For example, Liscow argues that we should have a thousand points of equity, presumably meaning that each point

⁴³ A flat rate consumption tax combined with appropriately designed transfers, however, can achieve a substantial degree of progressivity, which means that even in these circumstances, the need to rely on other tools such as legal rules may be limited. See, e.g., Isabel Correia, *Consumption Taxes and Redistribution*, 100 AMERICAN ECONOMIC REVIEW 1673 (2010).

of equity—a legal rule—is progressive.⁴⁴ Fennell and McAdam’s refer to the distributive *deficit* in law and economics, implying that there is not enough redistribution.⁴⁵ And Raskolnikov argues that numerous legal rules enacted since the 1990’s were regressive and were not offset by increases in the progressivity of the tax system. Raskolnikov’s assumption is that this combination is unfortunate.⁴⁶

There is, however, no reason that legal rules that deviate from efficiency to take distributive concerns into account would be progressive rather than regressive. The logic used by the critics, that the tax system is unresponsive to distributive concerns, is completely neutral on the direction that legal rules should take.

While I suspect that few people criticizing the income tax only argument would support regressive legal rules, there is nothing in the critics’ logic that can prevent this. Their arguments apply regardless of the views of the legal decision maker. It is, and must be, neutral to the views of the decision maker. It is no more appropriate to say that legal rules should be used to redistribute income when I like the views of the politicians doing the redistributing but not when I do not, than it would be to suggest touchdowns count for 8 points when I score and 6 points when you do. This means that Liscow’s logic implies that we should have a thousand points of inequity. Fennell and McAdams argument means that law and economics has a distributive excess.

⁴⁴ Liscow, *supra* note 10.

⁴⁵ Fennell and McAdams, *supra* note 13. They could be referring to the deficit in the consideration of distributive issues. They did not title their paper the “Redistributive deficit”. Nevertheless, they make clear in their discussion that they consider there to be too little redistribution in light of growing inequality.

⁴⁶ Raskolnikov, *supra* note 15.

Moreover, we are not, over time, likely to get neutral results, sometimes getting progressive legal rules and sometimes getting regressive legal rules. The reason is that redistribution via legal rules is less transparent than redistribution via the tax system. Because the tax system is the central tool that the government uses for redistribution, it has an extensive infrastructure for analyzing and reporting its distributive effects. As was described above, each piece of tax legislation is accompanied by distributional tables that show the change in the distribution of income caused by the tax change. In addition, each year, professional staffs in the government produce reports of the overall redistributive effects of taxes and transfers.⁴⁷ And private entities including non-partisan think tanks produce competing estimates. The distributive effects of the tax system and of tax law changes are highly visible.

There is no comparable information for the distributive effects of legal rules. Courts never produce this information. Nor could they. Nor would they view it as appropriate because they at least pretend that their job is to decide cases, not determine policy. Agencies issuing regulations rarely provide information on the distributive effects of the regulation. For example, as will be discussed further, a recent study examined 187 significant federal regulations and found that only two contained sufficient information to estimate their distributional effects.⁴⁸ Congress also does not generally produce distributional tables for changes to legal rules. And for reasons discussed in Part C, these institutional features are unlikely to change. They have been stable for many decades.

With less transparency, it is easier to have hidden transfers using legal rules. This possibility, by itself, does not have a valence. It could mean more hidden progressive transfers or more hidden regressive transfers. I suspect, however,

⁴⁷ See Congressional Budget Office, *The Distribution of Household Income*, (2019).

⁴⁸ Caroline Cecot and Robert W. Hahn, *Incorporating Equity Concerns in Regulation*, George Mason University Law & Economics Research Paper Series 22-19 (2022).

that it will mean more hidden regressive transfers. The reason is that political scientists tend to believe that the wealthy have undue influence on legislative outcomes.⁴⁹ Hidden transfers make it that much easier for them to exert influence. As a result, we might expect redistribution via the legal system to reduce the overall level of progressivity rather than increase it.

B. The costs of using legal rules to redistribute will be high

Even granting the critics' argument about the responsiveness of the income tax (see part I), and even assuming that legal rules would be progressive rather than regressive (see Part IIA), using legal rules to redistribute would be more costly than using the tax system. In particular, the income-tax only argument still applies when the tax system is not sufficiently responsive. This argument shows that using legal rules to redistribute is still more costly than using the tax system.

Moreover, there is a substantial body of work identifies a number of costs of using the legal system to redistribute that are entirely separate from those identified by the income-tax only argument.⁵⁰ This literature focuses on two problems with using legal rules. The first is known as the "contracting around" problem. Parties can often opt out of legal rules governing contracts and other situations where they cooperate with one another. For example, they may be able to override legal defaults by specifying contract terms. If contracts rules is inefficient, which they will be if they are used to redistribute, parties have an incentive to contract around. Second, legal rules are often haphazard. They

⁴⁹ BARTELS, *supra* note 3; Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSPECTIVES ON POLITICS 51 (2013); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUBLIC OPINION QUARTERLY 778 (2005).

⁵⁰ Many of the arguments were originally stated in A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 124–127 (2018).

are able to redistribute only among parties subject to those legal rules. They cannot redistribute generally from the better off to the worse off.

While these are powerful arguments, I think they miss the most important costs of using legal rules to redistribute. The problem is what we might call reversals.⁵¹ In particular, as noted in Part IIA, the critics' argument allows legal rules to be regressive as well as progressive. Whether legal rules are regressive or progressive will depend on the views of the individuals deciding on the content of the legal rules, such as judges, regulators, the President, or Congress or a subset of Congress. And given that in our democracy, there are regular changes in the party that controls all of our legal institutions, the views of legal decision makers change all the time. Sometimes those who want more progressivity will determine the content of legal rules. Sometimes those who want less progressivity determine their content. And sometimes, both decide simultaneously because they control different levers of government (e.g., the President is Democratic and issues regulations, and the judiciary is Republican and issues court decisions). That means that the distributive policy embedded in legal rules will reverse over time, and then reverse back, and so on.

Reversals generate high costs with few benefits. If, over time, legal rules are balanced in their redistributive effects, some progressive and some regressive, we get no additional redistribution but overall inefficiency.⁵² For example, one party might enact a progressive antitrust rule when it is in power. The other party might offset that progressivity by enacting a regressive trade rule, followed by the first party enacting a progressive labor law, and so on. The distributive effect is the net of these changes. The efficiency cost is the sum of the efficiency costs of each individual change, or the gross.

⁵¹ For a discussion of reversals, see Weisbach, Hemel, and Nou, *supra* note 11.

⁵² See *Id.*

For example, suppose that there are 100 legal rules, and 55 of them are inefficient but progressive and 45 are inefficient but regressive. The net is 10 legal rules that are progressive, which the critics would view as a gain. We get some additional redistribution. The cost, however, is 100 legal rules that are inefficient.

Because of the problem of reversals, the costs of using legal rules to redistribute may be orders of magnitude greater than the costs identified by the income-tax only argument. In the example above, we get 100 inefficient legal rules to get the redistribution generated by 10, or a 10 to 1 ratio. If the balance in the example were 50.5 to 49.5, we would net one legal rule that is redistributive for 100 inefficient legal rules. The income-tax only argument only considered the costs of that one legal rule but, in fact, the costs would be 100 times higher than described by that argument. And recall that those costs, even for a single inefficient legal rule, were already higher than using the tax system to redistribute.

Saying costs are high is abstract and not easy to internalize. The widely-used example of a redistributive tort rule does not give sufficient context to understand the costs. Saying that rich people pay higher damages and poor people pay lower damages in the somewhat rare event that they are defendants in a tort suit does not give any sense of what it means to use legal rules to redistribute.

It is, I believe, worth a short detour to get a sense of what those costs may be.⁵³ Daniel Hemel, in a recent paper, explored precisely this issue and provided a number of examples. Hemel's key insight is the outcome of using

⁵³ Of the critics, only Raskolnikov identifies actual legal rules that he believes might be used to redistribute. If the other critics do not like the examples identified here, they should identify which legal rules they think should be used to redistribute. Moreover, if their prescription is to redistribute anywhere we can—a thousand points of equity—it is hard to see how they can exclude these examples.

legal rules to redistribute depends on whether the efficient legal rule is regressive or progressive.⁵⁴ If the efficient legal rule is regressive in the sense that rich people benefit from the rule more than poor people, redistributing using that rule means making it weaker, and that may produce undesirable outcomes.

Air pollution rules provide a good example. Reducing air pollution has enormous efficiency benefits. According to a 2017 Lancet report, the United States has invested about \$65 billion in air pollution control since ___ and received benefits of about \$1.5 trillion, or 23 times the cost.⁵⁵ Globally the benefits may be even higher. On average, air pollution cuts lifespans by 2.2 years, but in northern India, it cuts lifespans by an astounding 8.5 years.⁵⁶ (In the United States, it is still __.)

Suppose we want to use air pollution laws to redistribute. Reducing air pollution, on average, helps the poor more than the rich, but at the same time, it appears that the poor bear a higher portion of the costs. As a result, the best estimates we currently have are that on net, air pollution laws are regressive, even if enormously cost-beneficial.⁵⁷

⁵⁴ Daniel Hemel, Regulation and Redistribution with Lives in the Balance, 89 U. CHI. L. REV. 649 (2022).

⁵⁵ Philip J. Landrigan et al., *The Lancet Commission on pollution and health*, 391 THE LANCET 462 (2018).

⁵⁶ These figures are according to the Air Quality Life Index, found at <https://aqli.epic.uchicago.edu/pollution-facts/>

⁵⁷ Richard J. Lazarus, *Pursuing Environment Justice: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 800 (1992). See also Hemel, *supra* note 56 at 706–707.

Because air pollution laws are regressive, using them to redistribute means making them weaker. Cutting back on air pollution controls deviates from the efficient rule in a progressive fashion, making the overall system more progressive. The cost is more air pollution, leading to shorter, less healthy lives.⁵⁸ These are, to be blunt, real costs, not abstract Kaldor-Hicks costs where somewhere, somehow, there is overall less wealth.

The same appears to be true of vehicle safety regulation. Hemel analyzes the rearview camera rule to illustrate the likely effects.⁵⁹ After extensive review, Hemel concludes that the regulation benefits wealthy households and hurts low-income households.⁶⁰ It is cost-beneficial but regressive. As with air pollution rules, using the rearview camera rule (and possibly many other vehicle safety rules) to redistribute means weakening or possibly eliminating the rule. We would get a less safety if we seek to make vehicle safety rules progressive.

A final example is immigration. The benefits of immigration appear to be large, both to the receiving nation (i.e., the United States) and, especially, for the immigrants.⁶¹ The distributive effects depend on how immigration affects wages. Crudely, high-skilled immigrants compete with domestic high-skilled

⁵⁸ One could try to jigger the rules so that they maintain their level of protection but become more progressive. As Hemel points out in the context of automobile safety rules, this is likely to be difficult.

⁵⁹ Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649 (2022).

⁶⁰ Hemel, *supra* note 56.

⁶¹See Giovanni Peri, *Immigrants, Productivity, and Labor Markets*, 30 JOURNAL OF ECONOMIC PERSPECTIVES 3 (2016).. The effects on the sending nation are more complex.

workers, lowering their wages, and similarly for low-skilled immigrants.⁶² Thus, the distributional effects of immigration depend on the balance of high-skilled and low-skilled immigrations. Current estimates are that immigration to the United States has, over the last __ years, been distributionally neutral, neither increasing nor reducing inequality because it has been balanced between high-skilled and low-skilled immigrants.⁶³

Using immigration laws to redistribute would likely mean changing who can immigrate to the United States. In particular, the United States would be less able to accept low-skilled, poor, immigrants. Instead, immigration policy would be skewed toward accepting high-skilled immigrants who would compete with high-skilled natives. Whether this is attractive depends on views about the role of immigration in the United States, but it is arguably contrary to key progressive values, the values that would support a more progressive legal system under the critics' arguments.

In short, the costs of using legal rules to redistribute are likely to be high and because of the problem of reversals, possibly orders of magnitude higher than the costs identified by the income-tax only argument. These costs are not abstract Kaldor-Hicks violations. They are real. We will get dirtier air, less safe automobiles and skewed immigration policies. These costs can be avoided if, instead, we use the income tax to redistribute.

⁶² The effects are likely more subtle because it can depend on whether immigrants act as a complement or a substitute for domestic labor, and that might depend on particular job markets.

⁶³ See Peri, *supra* note 62. Note that immigration also increases demand for goods and services, so it does not overall lower wages. If immigration is unbalanced, however, it can lower wages in particular sectors.

C. Institutions:

Using legal rules to redistribute requires particular institutions, such as courts, the President, or Congress, to enact those rules. There is, however, little or no discussion in the literature of these institutional choices and how those choices affect the ability of redistributive legal rules to achieve their goals.⁶⁴ I take up this task here, offering a preliminary assessment.

Before discussing possible institutions that might use legal rules to redistribute, it is worth laying out what is done in the tax system right now. There are three offices in the government with responsibility for estimating the distributive effects of tax laws: the Office of Tax Analysis in the Treasury Department, the Joint Committee on Taxation in Congress, and the Congressional Budget Office, also in Congress. Each of these offices employs a large professional staff devoted to estimating the distributive effects of proposed tax legislation. For example, the Joint Committee employs 27 economists (in addition to lawyers and other staff). These economists provide revenue estimates and distributional tables for all tax legislation. They use models built up over decades, often in consultation with outside experts. The economists in the Office of Tax Analysis perform similar but independent analyses. That means that every piece of tax legislation is accompanied by two estimates of its distributive effects, done by experts whose careers are devoted to studying the issue.⁶⁵ (The third office, CBO, does not provide distributional analyses of tax legislation as it is passed.)

⁶⁴ Fennell and McAdams list examples of possibly redistributive legal rules by courts, agencies, and legislatures, but do not discuss which of these institutions should be the primary focus of redistribution using legal rules. See Fennell and McAdams, *supra* note 13 at 1065–1069. Later, however, they appear to default to courts as the legal decision maker. See *Id.* at 1118–1119.

⁶⁵ It is possible that some proposals are analyzed by only the Joint Committee or by Treasury's Office of Tax Analysis because of the particular way they are introduced or

In addition, both the Congressional Budget Office and the Office of Tax Analysis put out annual publications on the distribution of the tax burden.⁶⁶ These publications allow assessment on how well the tax system is doing in addressing inequality and how that has changed over time.

Moreover, all three offices regularly publish papers explaining their methodology for estimating the distributional effects of the tax system. This allows the public, including outside experts, to comment on the methodologies and to understand the underlying assumptions.⁶⁷

In addition to these government offices, a number of private entities estimate the distributional effects of tax changes. For example, the Brookings-Urban Tax Policy Center uses a large scale microsimulation model to estimate the distributional effects of taxes.⁶⁸ It have put out estimates every year since its founding. The National Bureau of Economic Research has a model, known as TaxSim. TaxSim can be used, and is used by experts to estimate the

taken up by Congress. In the normal course, however, both offices analyze the distributive effect of tax proposals.

⁶⁶ Treasury's estimates can be found here: <https://home.treasury.gov/policy-issues/tax-policy/office-of-tax-analysis> The Congressional Budget Office estimates are found here: <https://www.cbo.gov/topics/income-distribution>

⁶⁷ For example, Treasury's methodology is found here: <https://home.treasury.gov/system/files/131/TP-8.pdf> The Joint Committee's methodology is found here: <https://www.jct.gov/CMSPages/GetFile.aspx?guid=8c7d67bd-1e93-4dbd-885b-be35e7077b1d> For a description of the development of the Joint Committee's methodology, see Thomas A. Barthold, *Measuring the Burden of Tax Changes: What Do We Tell Congress?*, 86 PROCEEDINGS OF THE ANNUAL CONFERENCE ON TAXATION HELD UNDER THE AUSPICES OF THE NATIONAL TAX ASSOCIATION-TAX INSTITUTE OF AMERICA 164 (1993).

⁶⁸ <https://www.urban.org/research/data-methods/data-analysis/quantitative-data-analysis/microsimulation/tax-policy-center-microsimulation-model>

progressivity of the income tax.⁶⁹ Private researchers, such as academics, also regularly estimate the distributive effects of different types of taxes and of the overall tax and transfer system.⁷⁰

In short, the ecosystem for estimating the distribution of the tax burden and its effects on inequality is vast, comprising numerous experts both in and outside of government. The government reports are central to the tax legislative process, in the words of Michael Graetz, outcome determinative.⁷¹

Note, finally, that there is a reason for all of this expertise. The distributional effects of taxes are not obvious and can be counter-intuitive. One cannot simply guess. For example, increasing taxes on corporations might seem to be progressive because corporations are rich. This cannot be right because corporations are just fictions. The tax has to be borne by people. The next obvious approach would be to assume that the tax is borne by the owners of the corporation. This again is not correct because returns to capital will tend to equalize across the economy. Even the possibility that the tax is borne by all capital is not likely correct (though unlike the first two guesses, it is possible) because capital is mobile internationally. If capital is mobile internationally, some portion, perhaps all, will be shifted to labor, making the corporate tax regressive. There is actually considerable uncertainty about the incidence of

⁶⁹ See <https://taxsim.nber.org/elas/> The NBER uses a progressivity measure known as the elasticity of the income tax, which measures how much, in percentage terms, taxes go up, when income goes up by a percent.

⁷⁰ The Auten and Splinter estimates are an example. (Both Auten and Splinter are in the government, Auten in the Office of Tax Analysis and Splinter in Joint Tax, but the paper represents their individual views, not the views of their respective offices.). The well-known estimates by Emmanuel Saez and Thomas Piketty of inequality and tax progressivity are another example. See Piketty and Saez, *supra* note 33.

⁷¹ See *supra* note 29.

the corporate tax, which is why the tax system uses numerous experts to try to sort these issues out.

Compare the set of tax system institutions to courts.⁷² Just as with the tax system, the incidence of legal rules can be subtle and counter-intuitive. For example, by far the legal rule that is most analyzed for its distributive effect is the minimum wage. Yet even after decades of analysis, with numerous publications in top journals, there remains considerable uncertainty, not only on the magnitude but even the direction of the effects.⁷³ Daniel Hemel's lengthy analysis of the rearview camera rule shows how difficult it is to determine the distributive effects of safety rules. As with the corporate tax naïve guesses are as likely to be wrong as right.

Judges have simply no idea how to assess these types of effects. They have no tools for estimating the incidence of a legal rule. They have no training in the matter. It would be surprising if even a small fraction of judges could explain the principles for incidence of taxes or legal rules that are taught in introductory microeconomics classes in college. (Few law students can do this,

⁷² Many authors assume that courts will be the central institution. For example, Fennell and McAdams assume that courts will be the relevant actors. Raskolnikov seems to be an exception. He considers a number of major laws passed over the last several decades that, he argues, turned out to be regressive. Raskolnikov, *supra* note 15. This means that he is assuming that Congress is the relevant legal actor.

⁷³ The literature is extensive. See, e.g., David Card & Alan B. Krueger, *Minimum wages and employment: A case study of the fast-food industry in New Jersey and Pennsylvania*, 84 *THE AMERICAN ECONOMIC REVIEW* 772 (1994); Thomas MaCurdy, *How Effective Is the Minimum Wage at Supporting the Poor?*, 123 *JOURNAL OF POLITICAL ECONOMY* 497 (2015); Peter Harasztosi & Attila Lindner, *Who Pays for the Minimum Wage?*, 109 *AMERICAN ECONOMIC REVIEW* 2693 (2019); Jeffrey Clemens, *How Do Firms Respond to Minimum Wage Increases? Understanding the Relevance of Non-employment Margins*, 35 *JOURNAL OF ECONOMIC PERSPECTIVES* 51 (2021).

and law students are future judges.) And even if they had the capacity to perform the analysis, they are not presented with the relevant information in the legal briefings. They do not hear experts on the matter during trial (in the tiny fraction of cases that go to trial). They may often not even know the right direction to shift a legal rule.

Even if judges were competent to assess the distributive effects of individual holdings, judges make largely uncoordinated decisions. This means that judges with different preferences and different understandings of the incidence of legal rules will all try to impose their views, often offsetting one another. All of these offsets act as a kind of reversal: we get inefficient decisions and no net distributive benefit.

Finally, judges lack democratic accountability. In the United States, at the federal level, judges are not elected. While federal judges at some level reflect the political preferences of the electorate because they are appointed and confirmed by elected representatives, it is not easy to see why, in a democracy, judges should be tasked with making distributive judgments based on their personal preferences.⁷⁴ As I write, for example, the federal judiciary is significantly to the right of most of the electorate. I would be surprised if most people right now want the federal judiciary imposing their views on the proper level of redistribution on them. The same would be true if the judiciary were significantly to the left of the electorate.

To be blunt, telling courts to decide cases based on their distributive preferences is a terrible idea.⁷⁵ They have no idea how to choose redistributive

⁷⁴ As I write, the federal judiciary is considerably more conservative than the country as a whole. I would be surprised if the critics, who seem to want more progressivity, would want the federal judiciary imposing its distributive views on the country.

⁷⁵ Fennell and McAdams defend courts' ability to issue redistributive legal rules by arguing that they are terrible at determining the efficient rule as well. Fennell and McAdams, *supra* note 13 at 1121 ("Efficiency analysis is just as complex and contested as distributive analysis, and most judges lack formal economic training."). This is not responsive to the

legal rules, for the most part they lack the capacity to impose those views on a coordinated basis, and they are the wrong actors in a democracy to try to do this.

The executive branch is a far more plausible venue for enacting redistributive legal rules. It employs many people with the technical expertise to analyze distributive issues, and issues regulations that cover a wide swath of the economy. The President has a degree of centralized control over agencies, allowing coordination across agencies. And the President has democratic accountability. As a result, the executive branch does not have the same obvious flaws that courts do.

There is, in fact, a large literature on the possibility of using regulations to redistribute, mostly relating to whether, and if so, how, cost-benefit analysis can incorporate distributive considerations.⁷⁶ Summarizing this literature is beyond the scope of this essay. I have previously expressed my views on these issues, arguing that the most agencies are not suited to taking on redistributive tasks.⁷⁷ Others disagree.⁷⁸

One key problem that is under-explored is that there is little expertise in distributional issues at the agency level. In recent work, Caroline Cecot and Robert Hahn examine 187 cost-benefit analyses of regulations by federal

argument that courts are not capable of making distributive judgments and are vastly worse than the tax staffs in both Congress and the Treasury at understanding distributive issues.

⁷⁶ For a discussion and a summary of much of the research, see Hemel, *supra* note 60..

⁷⁷ David A. Weisbach, Distributionally Weighted Cost-Benefit Analysis: Welfare Economics Meets Organizational Design, 7 JOURNAL OF LEGAL ANALYSIS 151 (2015).

⁷⁸ See, e.g., Matthew D. Adler, *Benefit-Cost Analysis and Distributional Weights: An Overview*, 10 REVIEW OF ENVIRONMENTAL ECONOMICS AND POLICY 264 (2016).

agencies over an almost 20-year period, looking for their distributional analysis.⁷⁹ There have been a number of executive orders directing agencies to consider equity when performing cost benefit analysis, so one might expect cost-benefit analysis to include at least some distributional analysis given. For example, Executive Order 12,866 requires consideration of distributive impacts. Circular A-4 states that “regulatory analysis should provide a separate description of distributional effects . . . so that decision makers can properly consider them along with the effects on economic efficiency”⁸⁰

Cecot and Hahn, however, find that in only 2 of their 187 regulations does an agency estimate net benefits for a specific group. In addition, 20 percent of the analyses in their sample calculate some benefits by group and 19 percent calculate some costs by group. They conclude “virtually no CBAs provide a distributional analysis that could help regulators evaluate whether the regulation, on net, advantages or disadvantages a particular group.”⁸¹ Agencies are simply not currently equipped to do distributional analyses.

This, in theory, could be fixed. Agencies could staff up with the relevant experts and build the necessary models replicating the distributional teams at Treasury, Joint Tax, and the CBO. There is, however, reasons to be skeptical that this will happen, and not only because it hasn’t happened notwithstanding the directives from multiple Presidents. The reason is that regulations are scattered throughout the executive branch. Developing the expertise to perform well-grounded distributional studies in many different agencies would be expensive. Each agency would effectively need to replicate the redistributive

⁷⁹ Caroline Cecot and Robert W. Hahn, *Incorporating Equity Concerns in Regulation*, George Mason University Law & Economics Research Paper Series 22-19 (2022).

⁸⁰ U.S. OMB 2003, p. 14.

⁸¹ Cecot and Hahn, *supra* note 79

expertise that the tax system has, even though for almost all legal rules redistribution would be a secondary consideration.

Perhaps only the agencies issue the most important regulations would need to scale up their expertise, such as the EPA, the Department of Energy, and the Department of Transportation. This would limit costs but would also limit which legal rules could be used to redistribute.

An alternative would be centralized expertise in, for example, the Office of Management and Budget. This, however, would involve OMB directly in regulatory choices in a way that is far more extensive than the current OMB review of regulations.⁸² It would require a substantial reordering of authority within the executive branch.

The last possibility is Congress. Congress is the most plausible institution because it already makes the most important distributive decisions, those in the tax code. Therefore, as a matter of the allocation of authority within our government, Congress is a plausible institution for making distributive decisions for legal rules.

The immediate problem this runs into is that since Congress is also the body that enacts the tax law, it is hard to see why we would want Congress to use legal rules to redistribute rather than the tax system. Once it is passing a law, why not use the tax system to effect the redistributive component. Perhaps passing both the legal rule and the tax change is more costly than just passing the legal rule. But since Congress has changed the tax law more than 1.5 times a year over the last 40 years, it does not seem that the costs of making tax changes are large.

⁸² Currently, OMB, through the Office of Information and Regulatory Affairs reviews regulations after they are completed. They are not involved directly in the development of regulations. For a discussion, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARVARD LAW REVIEW 1838 (2013).

There is more to be said about institutional choices and distributive judgments. It is possible that there are institutions other than the tax system that are equipped to make sound distributive judgments. The burden, however, is high given the vast expertise within the tax system on these issues and the utter lack of expertise outside of the tax system.

D. Fairness:

Both Fennell and McAdams, and Liscow have extensive discussions of the role of fairness. They both argue that people have a fairness-based preference for redistributing through legal rules rather than the tax system. This preference, they argue, makes it harder to enact redistributive taxes than to enact redistributive legal rules. As a result, they argue, the income-tax only argument fails. That is, fairness preferences prevent the income tax from being sufficiently flexible and responsive to replace redistribution through legal rules. The implication is that we should embrace redistribution through legal rules.

Neither set of authors present any evidence that people have a fairness preference for redistributing through legal rules rather than the tax system. I leave the details to the notes,⁸³ but to take one example, Fennell and McAdams'

⁸³ Liscow cites a survey that he suggests shows that the public supports more equality but at the same time does not support highly progressive taxation. Liscow, *supra* note 10 at 1 and 50. citing the PEW RESEARCH CENTER, *The Generational Gap in American Politics*, 18 (2018). The survey shows no such thing. The question on the relevant page of the survey, page 18, appears to ask whether the respondent believes that the economic system unfairly favors powerful interests (we are not provided with the actual questions). Someone may answer yes to this on the belief that various legal rules such as the antitrust rules have not been efficiently enforced. There is no reason to believe that survey respondents are sensitive to the nuances legal scholars make to distinguish efficiency from fairness. Indeed, many respondents may believe that efficient enforcement of various laws is fair.

Liscow, *supra* note 8, at 516-523 also includes the following fairness preferences as important to the choice of whether to use legal rules or the income tax to redistribute income: (i) people's lack of acceptance of a philosophical argument made by Liam Murphy

strongest case for a fairness preference that supports using legal rules to redistribute is a preference that people be able to earn a living wage. While people may have such a preference, the way that it has been implemented in the United States over the last 30 to 40 years is through the tax and transfer system. The minimum wage and various labor law rules regarding union organizing have been allowed to stagnate while the earned income tax credit has been increased substantially.⁸⁴ The evidence shows that people favor of

and Thomas Nagel that people do not own their own earnings; (ii) a belief that higher market returns are deserved, (iii) desert-based attitudes; (iv) a study of two hypothetical jazz singers where people think that the one who has a better genetic endowment should keep her earnings notwithstanding equal effort; and (v) a survey asking about how much hypothetical people should pay for a public good.

The fairness preferences that Fennell and McAdams mention in the relevant parts of their paper (pages 1099 to 1109) consists of the following: (i) a living wage, (ii) housing assistance, (iii) cash versus in kind transfers (specifically food stamps and housing vouchers), (iv) disaster relief, (v) punishment preferences, (vi) an unspecified preference regarding targeting, (vii) trade adjustment assistance, and (viii) the allocation of carbon reduction obligations among nations. Other than the living wage, none of these items are about whether we should use the tax system or the legal system to redistribute. The preference for housing assistance and various cash versus in-kind transfers are about how the tax and transfer system should function, not about whether to use the tax and transfer system or the legal system to redistribute.

⁸⁴ The federal minimum wage has been \$7.25 since 2009. See Department of Labor, History of Federal Minimum Wage Rates under the Fair Labor Standards Act, 1938-2009, <https://www.dol.gov/agencies/whd/minimum-wage/history/chart>. In inflation adjusted terms, it is lower than it was in 1980. Since 1980, it has moved around a bit, and its current value is the highest it has been since 1980. Before 1980, the most recent time it has been at or lower than its current value was 1950. See Craig K. Elwell, *Inflation and the Real Minimum Wages: A Fact Sheet*, Congressional Research Service, R42973 (2013). The Earned Income Tax Credit has increased dramatically since the 1980's, though its amount per recipient has been flat since the early 2000's. See Margot L. Crandall-Hollick, *The Earned Income Tax Credit (EITC): Legislative History*, Congressional Research Service R44825 (2022).

redistributing using the tax and transfer system rather than legal rules rather, exactly the opposite from what Fennell and McAdams suggest.

Even if there were evidence of a fairness preference for using legal rules rather than the tax system to redistribute, they would have no bearing on the costs and benefits of using legal rules to redistribute income that are examined in this section. Instead, the critics argue that fairness preferences make it more difficult to use the tax system to redistribute, the subject of Part I. There, rather than trying to infer how the tax and transfer system operates based on surveys about fairness or toy examples, we looked at what actually did happen.

That is, fairness preferences as used by the critics are not about the merits or the costs and benefits of redistributing through level rules. They do not argue that it is more fair to redistribute through legal rules. Nor do I think such an argument could be maintained. Instead, the fairness preferences discussed by Fennell and McAdams and by Liscow are about the costs and limitations of redistributing through the tax and transfer system. But to whatever extent people actually hold these preferences, they were implicitly incorporated in the tax changes analyzed in Part 1. As a result, we need not consider these fairness preferences here.

III. CONCLUSIONS

So far, I have examined the two elements to the analysis. First, I looked at how responsive the tax system is. I found that the tax system changes all the time, with major tax laws enacted at a rate of more than 1.5 times per year over the last 40 years. It has also become substantially more progressive over that period. This evidence refutes a bald claim that the tax system does not or cannot adjust in ways suggested by the income tax only argument. It is not, however, sufficient to establish that it necessarily does adjust as required.

Second, I looked at whether the legal system can be effective at redistributing income. The conclusion from that analysis is that most elements of the legal system are ill-suited for redistributing income. The costs of using the legal system are likely to be high, and the end result may be an overall

more regressive system rather than a more progressive system as theorized by the critics. Moreover, the key institution thought to enact redistributive level rules, namely courts, simply do not have the tools or the democratic legitimacy to do so. They would do it badly and would not necessarily represent the desires of the electorate.

Putting these together, the argument for using legal rules to redistribute income because of potential limitations on the ability of the tax and transfer system to do so is weak, indeed, almost non-existent. There could be circumstances where a nation would want to use legal rules to redistribute income. The United States between 1896 and 1913 might be an example because it was actually unconstitutional to have an income tax during that period. But currently in the United States, it is hard to imagine circumstances where using legal rules to redistribute would be preferred to amending the tax and transfer system.