Faculty Publications
UC Hastings College of the Law Library

Author: Leo P. Martinez
Source: Hastings Constitutional Law Quarterly
Citation: 31 Hastings Const. L.Q. 413 (2004).
Title: The Trouble with Taxes: Fairness, Tax Policy, and the Constitution

Originally published in HASTINGS CONSTITUTIONAL LAW QUARTERLY. This article is reprinted with permission from HASTINGS CONSTITUTIONAL LAW QUARTERLY and University of California, Hastings College of the Law.
The Trouble with Taxes:

Fairness, Tax Policy, and the Constitution

by LEO P. MARTINEZ*

"It’s not fair."

A child’s common plaint

Introduction

The word “fairness” has a simple ring to it. Despite this simplicity, fairness stands for a complicated set of moral and practical instructions inculcated in us since childhood. Consequently, fairness presents knotty problems of application for legal and policy analysts in the formulation of tax policy.

Dr. Stephen Wolfram, the author of A NEW KIND OF SCIENCE, has posited that the complexity of the universe is generated by a relatively simple set of rules.\textsuperscript{1} Indeed, it is an article of faith among scientists that the simplest, most elegant theory of any phenomenon generally proves to be the most accurate and enduring. Can the same be said of a system of taxation? This may well be a fruitless inquiry. As one scholar has remarked, “[i]t is sometimes said that it is utopian to look for a simple tax law.”\textsuperscript{2} This is in part because our tax system uses a set of complex rules to reach a balance between two relatively straightforward goals – revenue generation and fairness.\textsuperscript{3}

\* Professor of Law and Academic Dean, University of California, Hastings College of the Law. Special thanks to Professor Nancy Staudt of the Washington University School of Law, Professor Marjorie Kornhauser of the Tulane University School of Law and to my colleagues Vic Amar, David Fagian, Evan Lee and Calvin Massey for their insights into and inspiration for the creation of this article. The author gratefully acknowledges the diligent and able research assistance of Paul Stinson, Michelle Altick, Catherine Paskoff Chang and Simone Katz.

1. STEPHEN WOLFRAM, A NEW KIND OF SCIENCE 2-3 (2002).


3. For an argument that details this tradeoff of simplicity for equity, see Samuel A.
A tax system, unlike a theory of the universe, must not only be simple it must also be “fair.” At a minimum, it must be perceived as fair by the taxpaying public in order to withstand the public’s scrutiny. The fairness of taxation and the meaning of tax fairness have, not surprisingly, spawned wide-ranging debate. More than a few distinguished theorists have posited that the notion of fairness (or, in some instances, “equality”) has neither meaning nor place in legal analysis.4

Our aversion to unfairness is innate. Anyone with some knowledge of children recognizes that a child’s sensitivity to unfairness is already well developed even at an early age. Thus, for example, when a sibling intrudes in a child’s space in the back seat of an automobile, the request for redress of the attendant intrusion and unfair allocation of space is swift and pointed. So, too, is the response of an adult who perceives a misallocation of tax burdens. To underscore the case, where there is a perceived inconsistency or unfairness in the tax system, the public’s reaction is strongly negative.5 At the same time, perceptions of fairness in taxation appear to bear no more than that of a child’s sophistication in terms of policy or analysis.6 As Professor John A. Miller has explained, “[a] few years ago the smartest person in the world was asked what she thought of our tax system. This person, Marilyn vos Savant, replied that it was ‘clearly unfair’ to require some persons to pay more taxes than others . . . . In her view, one’s payment of taxes is analogous to the purchase of a hamburger. Why, she asked, should one person pay more than another person for a hamburger?”7

This article probes the contours of the concept of fairness in taxation. I begin and end with the observation that fairness or the


5. See, e.g., Robert J. Leonard, *A Pragmatic View of Corporate Integration*, 35 Tax Notes 889, 896 (1987) (explaining a strong negative reaction to an informal suggestion of President Reagan that the corporate income tax be repealed — a suggestion that was quickly retracted after fierce public criticism).


perception of fairness in taxation is a deceptively unsophisticated proposition. Part I includes a brief description of the public perception of fairness in the context of taxation. Part II follows with an exploration of the concept of fairness as a fundamental tenet of tax policy with particular scrutiny of the principle that equals should be taxed equally. In Part III, I deal with fairness as a constitutional norm and I argue that, while fairness in taxation has solid policy underpinnings, fairness (at least as a substantive proposition) is not a matter of constitutional dimension. I conclude in Part IV that fairness is, with some minor qualifications, not a matter of deep constitutional lore or economic arcana, but rather an instinctual matter more analogous to a child’s perception of fairness than to that of a modern day economist’s.

I. Public Perception of Taxes

Every government needs its citizens’ financial support – whether voluntarily or involuntarily obtained – not only to function efficiently but also to function at all. This idea is so basic to government that it has been observed that a penniless state cannot protect adequately the rights of its citizens.\(^8\) Justices Holmes and Brandeis famously captured the essence of this fiscal reality when they said: “Taxes are what we pay for civilized society . . . .”\(^9\)

It follows that the power to tax is among the most fundamental and wide-reaching powers of government. The Supreme Court has stated “[t]hat the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm.”\(^10\)

The tax system in the United States exists to raise revenue and to ensure stable economic growth.\(^11\) A less recognized, though still crucial, role of the domestic tax system is to function as a vehicle of

---


social and economic policy. The significance of the tax system both to the nation’s fiscal health and its social well being argues for a system of taxation that is fair, if for no other reason than to facilitate the collection of revenue. Fairness is indispensable to enacting tax legislation because it increases taxpayer morale and enhances voluntary compliance. Perceptions of fairness facilitate tax collection and they explain why fair distribution of the tax burden is a central concern in the enactment of tax legislation.

Chief Justice Marshall opined that the power to tax requires popular confidence that such power will not be abused. Similarly, Adam Smith, in *The Wealth of Nations*, asserted that “[a]ll nations have endeavored . . . to render their taxes as equal as they could contrive; as certain, as convenient to the contributor, both in the time and in the mode of payment, and in proportion to the revenue which they brought to the prince, as little burdensome to the people.”

---


Even the Executive takes pains to cite fairness as a centerpiece of tax initiatives. John M. Broder, *With the Federal Deficit Falling, The President Weighs a Tax Cut*, N.Y. Times, Dec. 5, 1997, at A1 (noting that President Clinton would consider tax reduction if it was “fair”).

The need for equity in the system of taxation is also shown in the scheme of criminal and civil penalties – the primary method of enforcement of the tax laws. Tax penalties are said to establish the fairness of the tax system by giving the noncompliant taxpayer what she deserves. Executive Task Force, *supra* note 13, at ch. III 2; see also Michael I. Saltzman, *IRS Practice and Procedure* § 12.01 (2d ed. 1991). To the extent that this retributive component of punishment is fair, the tax laws are fair.


goes without saying that balancing the government’s need for revenue with a fair revenue-generating mechanism is a delicate task.

This requirement of fairness (or at least the perception of fairness) has long been a veritable constant, and it is rare that discourse on taxation does not emphasize fairness as a fundamental and desirable attribute of any tax system. The eighteenth-century commentator William Blackstone reasoned that public perception of the government’s power to tax is a crucial element of tax enforcement.18 He illustrated his point by highlighting the popular preference for one tax over another.

In England, in his day, a retail or consumption tax, called an excise duty, represented an economical method of taxation that resulted in lower prices than customs taxes. However, as Blackstone explained, the “rigor and arbitrary proceedings” of tax law violations caused the tax to be so unpopular that mere rumor of such a tax was dismissed by pundits as an outrageous sham.19

In contrast, the public embraced a post office tax with “cheerfulness, as, instead of being a burden, it [was] a manifest advantage to the public.”20 Taking a demonstrably utilitarian or consent theory approach to taxation, Blackstone said, “[t]here cannot be devised a more eligible method than this of raising money upon the subject: for therein both the government and the people find a mutual benefit. The government acquires a large revenue; and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed.”21 Though the post office tax might not have been as economically efficient as the consumption tax, the public’s willingness to pay the former made it the better option because of the perceived


18. According to Blackstone, municipal law is the “rule of civil conduct prescribed by the supreme power in a state... commanding what is right, and prohibiting what is wrong,” and one of its purposes is to define and lay down these rights and wrongs of society. 1 William Blackstone, Commentaries **53-55 (italics omitted). Thus, “in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.” Id. at *55.


20. Id. at *321.

21. Id. at **321-23.
fairness of the post office tax and its benefit to the public at large.

Empirical studies reveal that the modern populace's perception of tax fairness continues to diverge significantly from reality. In one prominent study, Michael Roberts and Peggy Hite discovered that, though the public may believe current taxation is unfair, when asked to specify what rate structure would be fair (based on income) respondents tended to choose rates remarkably similar to those actually in place. 22 Specifically, when asked an open-ended question regarding the level of taxation that would be "fair" for nine income levels, ranging from $5,000 to $100,000, respondents, on average, chose rates that were the same or higher than those currently imposed (as of the year of the study). 23 As the authors noted, this conclusion was striking, given the widely held view that tax burdens are too high.

A majority of respondents in the Roberts and Hite study also preferred a graduated to a flat tax rate, 24 although respondents could generally be broken down into three relatively equal groups—steep progressives, mild progressives and flat raters—regarding their tax allocation preferences. 25 The latter observation perhaps explains a great deal about why fairness is such a tough nut to crack when it comes to determining an equitable allocation of tax burdens. With the nation split fairly evenly into thirds among those favoring various rate structures, cries of unfairness will arise no matter what rate structure is imposed.

What does this mean for those seeking to create a fair tax system? Roberts and Hite simply conclude that "the general public is not knowledgeable about effective tax rates," and that perceptions of the inherent unfairness of the tax system may have more to do with the hyping in the media and amongst politicians of marginal rates, rather than the rate structure itself. 26

23. Id.
24. Id. at 35. Sixty percent agreed that graduated tax rates are fairer, while 33% preferred a flat rate, and 7% were indifferent between the two.
25. Id. at 36. Thirty-four percent preferred a flat 20% tax rate as the fairest, 28% chose the mildly progressive 1987-1991 rate schedule, and 33% preferred the more steeply progressive 1981-1986 rate schedule as the fairest.
26. Id. at 40. For an assessment of the interplay among public perception, the media, and taxpayer compliance, see Leandra Lederman, Tax Compliance and the Reformed IRS, 51 U. KAN. L. REV. 971, 1010 (2003). Professor Lederman warns that:

Unfortunately, the media focus on horror stories and the need to "reform" the IRS may suggest to taxpayers that IRS personnel have found that they need to "abuse"
That is, it would seem that tax fairness (or unfairness) is not a lofty concept for most Americans. Absent the persistent frothing over “government sponsored theft” and the pillaging of the American public by an out-of-control government, most taxpayers probably would be hard-pressed to squawk about or even to identify a tax injustice. To be sure, rate hikes, like trips to the dentist, are never popular. But, at bottom, while the average taxpayer may find herself feeling queasy around April 15, most people simply do not have the time or the inclination to take to the streets over unfairness unless some major push-button issues are involved.  

II. Fair is Fair, or is it?

John Stuart Mill’s exposition of the relationship between justice and utility used taxation as an example for demonstrating how one’s method of justice can vary widely from another’s. He observed that while one could argue that everybody should be taxed the same amount, “as the subscribers to a mess, or to a club,” another could assert that justice required “graduated taxation.” Mill concluded that utilitarianism should drive tax policy because the many notions of justice only add confusion.

Despite Mill’s caution, we continue to try to incorporate the concept of fairness (or justice) into our political discourse. As a matter of sound policy and as a matter of pure intuition, the apparent simplicity of fairness is captivating. What is fair, or how to achieve fairness, however, remains elusive.

Attempts to grapple with fairness in the context of taxation have been undertaken by law and economics theorists such as Professors Louis Kaplow and Steven Shavell. Kaplow and Shavell’s general

taxpayers in order to collect from them. This may tend to suggest that noncompliance is rampant, which, in turn, may tend to undermine normative commitments to compliance.

Id.

27. David Bradford states:
   Even though polls may register declining confidence in the income tax, what many people mean by reform is lower taxes, and few are prepared to give up their own tax preferences in the interest of a simple, low-rate system. Politicians typically report little serious constituent pressure for simplification or rationalization of the law.

BRADFORD, supra note 3, at 289 (citation omitted).


29. Id.

30. See, e.g., Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 HARV. L
theme is that notions of fairness, which may include ideas regarding justice, rights, and related concepts, will in some instances result in outcomes which do not advance individuals’ well-being. This may seem facially true: if fairness forces me to split my lime popsicle with my brother, even though he hates lime popsicles, and I will be made miserable by the split, what exactly has been gained? Kaplow and Shavell would prefer that all choices be made in accordance with welfarist principles, which would always select the outcome that results in the greater increase in individuals’ well-being.

Yet, Kaplow and Shavell recognize that their pure principle of fairness, in which legal rules are evaluated without regard for individuals’ well-being, is not typical, and that most legal analysts will hold views of fairness that consider individuals’ well-being. They further recognize, and even endorse, the use of notions of fairness as standards for everyday decision-making, as guides to common morality, and as “tastes” which may be included in a welfarist analysis. Hence, one is left with the distinct impression that it is not fairness which Kaplow and Shavell reject, but some stripped-down version of distributive justice that requires normatively justifiable outcomes without regard for human consequences.

Another academic who has probed the idea of fairness in taxation, Professor Marjorie Kornhauser, has emphasized the conceptual difficulty of defining fairness. She advances the thesis that the multi-faceted components of fairness, including economic, philosophical, political, and practical elements, make fairness too complex to determine.

31. Id. at 999-1000.
32. Id. at 1009. See also Louis Kaplow & Steven Shavell, Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency, 110 YALE L. J. 237 (2000). In the latter piece the authors also present a summary of their claim that consistent adherence to notions of fairness may result in choices which violate Pareto optimality. This conclusion has been disputed, however. See Howard F. Chang, A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle, 110 YALE L.J. 173 (2000).
33. Kaplow & Shavell, supra note 30, at 1002-03.
34. Kaplow & Shavell, supra note 32, at 249.
35. For an excellent critique of Kaplow and Shavell’s theories, see Ward Farnsworth, The Taste for Fairness, 102 COLUM. L. REV. 1992 (2002) (arguing that “notions of fairness have a legitimate place in legal policymaking even if the aim of the enterprise is to improve welfare”).
In the legislative arena, the concepts of fairness and utility remain fundamental to the formulation and administration of federal tax policy. Evidence of this ongoing pursuit of fairness can be found in the “bewildering complexity” of the Internal Revenue Code (“I.R.C.”). Congress’ desire to account for various personal circumstances drives Capitol Hill to create complicated, multi-faceted tax laws. Professor Donaldson argues that the fact that “Congress has often sacrificed simplicity for the cause of equity . . . [is] an implicit recognition that fair laws are more desirable than easy laws.” Professor Musgrave, instead, would suggest that a good tax structure is one that is simple and facilitates an equitable distribution of the tax burden. The difficulty with this recommendation, however, is that while “[e]veryone agrees that the tax system should be equitable, i.e., that each taxpayer should contribute his ‘fair share,’” there is far less agreement on what each person’s fair share is.

37. Sneed, supra note 17, at 601 ( theorizing that the two dominant criteria of federal tax policy are equity and practicality). The primacy of these two considerations is underscored by the I.R.S.’s study of reform of the penalty system. EXECUTIVE TASK FORCE, supra note 13, at ch. III 3-4. The I.R.S. labels the two components fairness and effectiveness, but the thrust of the study is essentially similar.

38. SLEMMOD & BAKIJA, supra note 6, at 51.

39. Ironically, as David F. Bradford has pointed out, the complexity and attendant confusion involved in designing and administering a “fair” system can themselves prompt perceptions of unfairness. “A law that can be understood (if at all) by only a tiny priesthood of lawyers and accountants is naturally subject to popular suspicion.” BRADFORD, supra note 3, at 266.

40. Donaldson, supra note 4, at 681.


“[I]t is generally agreed that taxes should bear similarly upon all people in similar circumstances.” HENRY SIMONS, FEDERAL TAX REFORM 8 (Univ. of Chicago Press 1950). “[T]he subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities. . . .” SMITH, supra note 16, at 777. For a concise and informative overview of these various historical approaches to tax equity, see Richard A. Musgrave, Horizontal Equity, Once More, 43 NAT'L TAX J. 113 (1990).

Fair distribution of the tax burden also is an oft-cited concern in enacting tax legislation. See, e.g., SENATE FINANCE COMM., supra note 14, at 97 (commenting that the Tax Equity and Fiscal Responsibility Act of 1982 was designed to improve tax equity); JOINT COMMITTEE ON TAXATION, supra note 14, at 7 (stating that the primary objective is to ensure that individuals with similar income pay similar amounts of tax); HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., REVENUE RECONCILIATION ACT OF 1990 2 (Comm. Print 101-37 1990) (detailing the attempt to distribute the tax burden “among all taxpayers in a fair and equitable manner”).
Modern tax policy relies on two crude tools to strive towards a definition of fairness: horizontal equity and vertical equity. Tax theorists use these principles "as the standards for measuring the fairness of the tax laws." Horizontal equity reflects the notion that similarly situated taxpayers should carry the same burden. Vertical equity, on the other hand, acknowledges that people with more wealth should carry a larger burden. As will be shown, the tools we have to assist in achieving fairness are, at best, imprecise.

Vertical equity finds its foothold in the idea that higher income taxpayers who have a greater ability to pay taxes should contribute relatively more tax dollars to the fisc than lower income taxpayers to whom every dollar is dear. Thus, vertical equity concerns itself with "the proper pattern of unequal taxes among people with unequal incomes." The principle of vertical equity has not been recognized as either constitutionally required or forbidden. Indeed, discussions of vertical equity in general, under the guise of support or criticism of progressive taxation abound, and I have saved my own musings as to the constitutionality of progressive taxation for another work. For the purposes of this article, it suffices to note, as more than one commentator has, that any system of progressive taxation is subject to criticism as unfair if the poor are disproportionately taxed and to criticism as class warfare ("soaking the rich") if the wealthy are


44. Slemrod & Baki, supra note 6, at 51.

45. Musgrave & Musgrave, supra note 14, at 194.

46. See Break & Pechman, supra note 41, at 5 (noting that vertical equity is "the distribution of tax burdens among people with different amounts of income and wealth"); David M. Hudson, Tax Policy and the Federal Taxation of the Transfer of Wealth, 19 WILLAMETTE L. REV. 1, 4 (1983); Staudt, supra note 43, at 940 (observing that "utilitarianism imposes a moral obligation upon citizens to pay taxes pursuant to a tax structure that minimizes overall costs — or maximizes aggregate utility").

47. Musgrave & Musgrave, supra note 14, 199 (emphasis added).


disproportionately taxed.\textsuperscript{50}

If attempts to adhere to a principle of vertical equity present the problem of establishing fairness in the tax rates between groups of taxpayers, horizontal equity illustrates the difficulty of establishing what those groups are. The principle of horizontal equity provides that similarly situated taxpayers should be similarly taxed.\textsuperscript{51} Horizontal equity is an intuitive concept that enjoys popular acceptance.\textsuperscript{52} Yet, at the same time, horizontal equity is a core problem in examining the notion of fairness.\textsuperscript{53}

In the context of income taxation, the Haig-Simons approach identifies income as the sum of an individual’s consumption plus her change in wealth over a relevant time period.\textsuperscript{54} Professor Eric Zolt explains that “uniform treatment rests on the general acceptance of the Haig-Simons definition of income and the desirability of global taxation.”\textsuperscript{55} He continues by observing that “[this] approach rests on fairness grounds—individuals with equal income are taxed equally, without regard to the source or the use of the income—and on efficiency grounds—individuals face the same tax rate for different investments.”\textsuperscript{56} Such a proposition hardly seems controversial, yet attempts to include this intuitively appealing notion in viable normative models of taxation have resulted in heated debate.\textsuperscript{57} For example, Professor Richard Musgrave noted in 1976, that “[i]n the absence of vertical equity norms, the case for horizontal equity is

\begin{footnotesize}
\begin{enumerate}
  \item Slemrod & Bakija, supra note 6, at 5-6 (noting that some critics see increasing the tax burden on those with high incomes as “soaking the rich” or “class warfare”); see also Maureen B. Cavanaugh, Democracy, Equality, and Taxes, 54 ALA. L. REV. 415, 456 (2003) (“soaking the rich” in the Athenian tax system).
  \item Musgrave & Musgrave, supra note 14. See also Break & Pechman, supra note 41, at 5 (stating that a system which treats equally all those who are in economically similar positions is known as horizontal equity); Kornhauser, supra note 42, at 619 (“[H]orizontal equity says that those with equal amounts of income should pay equal amounts of tax.”); Hudson, supra note 46, at 3 (arguing that similarly situated persons should be taxed in a similar manner).
  \item “[M]ost people subscribe to at least the general principle of horizontal equity . . . .” Break & Pechman, supra note 41, at 6.
  \item See, e.g., Louis Kaplow, Horizontal Equity: Measures in Search of a Principle, 42 NAT’L TAX J. 139 (1989); Musgrave, supra note 41.
  \item Id. at 41.
  \item Id at 46.
\end{enumerate}
\end{footnotesize}
reduced to providing protection against malicious discrimination, an objective which might be met more simply by a tax lottery.”

His point was that horizontal equity meant little. Or, as Professor Zolt has succinctly stated:

Perhaps the most powerful challenge to horizontal equity is that it is, by itself, a meaningless concept. Simply saying that we should accord equal treatment to equals adds little or nothing. We need to choose an ethical framework before making any comparisons, whether by comparing equals or making “appropriate” comparisons among unequals.

In other words, however intuitive the concept of horizontal equity might be, the practical application of this principle, like that of vertical equity, requires repetition of the observation that fairness is elusive. A few examples illustrate the problem.

First, there is no normative or intrinsically fair level of taxation. For example, it is not unfair to tax all taxpayers at the 10% rate without deductions and it is not unfair to tax all taxpayers at the 35% rate with some deductions. Indeed, during and after World War II,

58. Richard A. Musgrave, ET, OT and SBT, 6 J. PUB. ECON. 4 (1976), cited in Harvey E. Brazer, Income Tax Treatment of the Family, in THE ECONOMICS OF TAXATION 225 (Henry J. Aaron & Michael J. Boskin eds., The Brookings Institution 1980). This comment was a reiteration of one made much earlier in RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE (1959). “Without a scheme of vertical equity, the requirement of horizontal equity at best becomes a safeguard against capricious discrimination – a safeguard which might be provided equally well by a requirement that taxes be distributed at random.” Id. at 160. As noted, however, Professor Musgrave has since reconsidered this position. See, e.g., Richard A. Musgrave, Horizontal Equity, Once More, 43 NAT’L TAX J. 113 (1990); Richard A. Musgrave, Horizontal Equity: A Further Note, 1 FLA. TAX REV. 354 (1993). I applaud Professor Musgrave’s original insight. I may not agree, however, with his subsequent abandonment of this position, the essence of which has essentially become the constitutional norm for deciding tax cases.


60. While Professor Marjorie Kornhauser has observed that “[t]heory and empiricism are not opposites, but rather are engaged in a joint enterprise,” theory and empiricism nonetheless are uncomfortably juxtaposed. Kornhauser, supra note 36, at 161. See also Nancy C. Staudt’s thoughts on the subject:

This narrow version of horizontal equity, which calls for Congress to impose equal tax burdens on equally situated individuals, therefore raises a number of barriers for policymakers . . . . [I]t is next to impossible to identify similarly situated individuals and any attempt to do so will most likely produce the very same inequities that theorists and legislatures seek to remedy.

Staudt, supra note 43, at 931.
the highest marginal rate in the U.S. rose—astonishingly—above the 90% mark, and essentially remained there until 1964. 61 Yet, there was no armed uprising or storming of the White House by angry taxpayers crying oppression or unfairness. Apparently, it is not simply marginal rates that determine fairness.

Second, the existence of a set of deductions, credits or kinds of income may act to define a class of “similarly situated” taxpayers. Thus, taxpayers who make charitable deductions can fairly be treated differently from other taxpayers who are more parsimonious. While the system of charitable deductions is just one example, the different classifications of income, the exclusion of income, and the system of tax credits all contribute to a finer parsing of what constitutes “similarly situated.” There is no predetermined natural classification system to which the tax system must correspond in order to be “fair.” That is, the tax code itself determines who is similarly situated, and not the other way around. In the process, the tax code itself also defines what is fair through its modes of classification. Therefore, it is not surprising that a notion of fairness in taxation ex ante taxation is hard to define, for no such notion exists—although our notions of fairness and equality in other contexts are likely to intrude.

Third, the system of deductions, credits and kinds of income is a dynamic one. That is, the elimination of tax deductions or credits, or any tinkering with the Internal Revenue Code, necessarily affects those who can be described as “similarly situated.” For example, those who own personal residences are not similarly situated those who rent. Consequently, the existence of the home mortgage deduction favors homeowners over renters. 62 Different treatment of homeowners and renters can be justified on the basis that they are not similarly situated. 63 It is not unfair to do so. If the home mortgage deduction was eliminated, and all characteristics between renters and homeowners were equal, the two groups would be similarly situated within the tax code. Treating the two groups in the same way would not be viewed as unfair. It follows that the very act of changing the system of deductions, credits and kinds of income, does not result in

61. Pechman, supra note 11, at 301, 313-14.
63. “Although the tax law provides benefits for home ownership, no horizontal inequity exists if everyone has the choice between owning and renting.” Zolt, supra note 54, at 91.
inherent unfairness.\textsuperscript{64}

With the myriad number of deductions, credits and exclusions available in the I.R.C., the categories of "similarly situated" taxpayers, controlling for income, might very well number in the thousands.\textsuperscript{65} Professor Zolt has observed that a result of this complexity is that "uniform taxation" is assumed to offer:

[the] advantage of taxing all income in the same manner, regardless of the source. We are told this is both fair and efficient. It is fair because the tax system treats taxpayers with similar amounts of income in a similar manner, even if their income has been derived from different sources. It is efficient because the tax system treats income from all sources equally, thus minimizing the distortionary effect of taxes on resource allocation.\textsuperscript{66}

As Professor Zolt's summary of the uniform taxation pitch indicates, the problem of classifying which taxpayers are "similarly situated" is a function of how narrowly defined the term "similarly situated" is as it pertains to horizontal equity.\textsuperscript{67} At the limit, the notion of "similarly situated" is such that no taxpayer is similarly situated with another and the principle of horizontal equity becomes nothing more than a cruel joke.

Notwithstanding the foregoing, I do not challenge that the role of fairness in taxation is essential. I agree with historian Robert Hughes' observation that equality is the mother of harmony.\textsuperscript{68} The challenge in making fairness a key part of a tax system and putting the principle into practice is the difficulty of determining what is fair.\textsuperscript{69} The

\textsuperscript{64} A better way to phrase this is that certain forms of discrimination are easily justified. MURPHY & NAGEL, supra note 36, at 162-166.

\textsuperscript{65} This is probably a very conservative estimate. I leave this exercise in forensic probability to my more numbers-oriented colleagues.

\textsuperscript{66} Zolt, supra note 54, at 42.

\textsuperscript{67} JOSEPH J. MINAREK, MAKING TAX CHOICES 22 (John L. Palmer et al. eds., 1985) (describing the range of circumstances as enormous).

\textsuperscript{68} ROBERT HUGHES, BARCELONA 279 (Vintage Books 1993); see Kenneth W. Simons, The Logic of Egalitarian Norms, 80 BOSTON U. L. REV. 693, 770 (2002) (recognizing that equality is both a weak principle and a potent one).

\textsuperscript{69} "What is fair or equitable is not susceptible to simple formulations or short phrases, such as equal treatment of equals or appropriate differences of unequals." Zolt, supra note 54, at 108. While I applaud the more expansive examination of this aspect of tax policy through the lens of distributive justice, it is also apparent that distributive justice does not lend itself to any greater precision. See MURPHY & NAGEL, supra note 36, at 38-
underlying assumption of this piece is that fairness is inextricably woven into the fabric of taxation. At the same time, however instinctual our reaction to what is unfair, it is of no utility in defining fairness because of the difficulties in establishing its meaning.

III. Fairness as a Constitutional Norm

The government's power to tax is seemingly unlimited. Alexander Hamilton's view was that the power to tax was the most important of the legislative powers. As noted in Part I, the powerful and fundamental nature of the ability to tax has been widely acknowledged by the United States Supreme Court throughout its history. From McCulloch v. Maryland to the present, the Court has affirmed this necessary governmental power in the face of a variety of challenges. What is remarkable is that these affirmations, save for those in the very early cases, have been made without a discussion of, or reliance on, fairness. Rather, the Court uses three themes that in many ways work in conjunction: an emphasis on the basic nature of the taxing power; deference to legislators; and establishing an exceedingly high threshold to find a tax unconstitutional. The Equal Protection Clause, the Privileges and Immunities Clause, the dormant Commerce Clause, and other constitutional doctrines have had

39.

70. THOMAS CARLYLE, Inertia, in THE FRENCH REVOLUTION: A HISTORY 131 (New York, Random House 2002) (1829) (describing government as a "taxing machine"). See People v. Adirondack Ry. Co., 54 N.E. 689, 692 (N.Y. 1899) (Vann, J.) ("The power of taxation [and other powers] underlie the constitution, and rest upon necessity, because there can be no effective government without them. They are not conferred by the constitution, but exist because the state exists .... They are .... rights inherent in the state as sovereign .... The state cannot surrender them .... They are as enduring and indestructible as the state itself."), aff'd, 176 U.S. 335 (1900).

71. THE FEDERALIST NO. 33 (Alexander Hamilton).

72. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (stating that differential taxation power is a "powerful weapon against the taxpayer selected"); Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 563 (1830) (noting that the power to tax "operates on all the persons and property belonging to the body politic and "has its foundation in society itself")

73. 17 U.S. (4 Wheat.) 316 (1819).

74. See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (examining a state sales tax on general interest magazines that was being challenged on First amendment grounds); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874) ("The power to tax is .... the most pervading of all the powers of government ....") ; Soc'y for Savings v. Coite, 73 U.S. (6 Wall.) 594, 606 (1867) (examining a franchise tax on deposits made to Connecticut banks that was challenged as violating enumerated powers).
minimal effect in this area. It should be no surprise, then, as a
matter of constitutional law, fairness does not play an explicit part in
the Court’s analysis. What follows is a broad-brush description of the
principles involved concluding with the observation that the judicial
tendency is legislative deference in tax matters.

A. The Taxing Power

The Court has taken pains to articulate that the taxing power
“resides in the government as a part of itself” and is “never presumed
to be relinquished.” Because the taxing power exists “for the benefit
of all” including the government itself, the Court allows seemingly
unbridled taxation of all taxpayers over which the government has
“sovereign power.”

The Supreme Court, in turn, is hesitant to impinge on Congress’
broad power to tax. The “assumption of constitutionality” of any
economic regulatory legislation passed by Congress restricts the
Court in these circumstances. As a general proposition, the
presumption of constitutionality of economic legislation is subjected
to “more exacting judicial scrutiny” only in instances where the
Constitution specifically prohibits legislation that, for example,

75. Boris I. Bittker, Constitutional Limits on the Taxing Power of the Federal
Government, 41 TAX LAW 3, 12 (1987) (observing that the debatable distinctions in the
Internal Revenue Code would lead to never-ending judicial review). Professor Bittker’s
piece also contains a wide-ranging discussion of the constitutional limits, which he
characterizes as “points of friction”, on taxation that is far broader than the discussion in
this article. Id. at 5-9. See George F. Carpinello, State Protective Legislation and
Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Non
Discrimination, 73 IOWA L. REV. 351, 411 (1998) (Privileges and Immunities Clause
intended to preclude parochialism); Edward A. Zelinsky, Restoring Politics to the
Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition
on Discriminatory Taxation, 29 OHIO NORTHERN L. REV. 29, 79-88 (2002) (criticizing the
incoherence of the dormant commerce clause and constitutional doctrine).

76. Soc’y for Savings, 73 U.S. (6 Wall.) at 606 (citations omitted) (upholding state’s
power to impose a franchise tax on bank deposits reinvested into U.S. tax-exempt
securities).

77. Id. at 606; Cook v. Tait, 265 U.S. 47 (1924) (stating that the power to tax extends
to citizens domiciled, and income derived from property situated, in foreign countries).

Internal Revenue Service’s right to levy against the entire balance of joint bank accounts
(upholding the government’s right to sell the entire property of a delinquent taxpayer
despite the property interests of innocent third parties); G.M. Leasing Corp. v. United
States, 429 U.S. 338, 352 (1977) (rejecting Fourth Amendment challenge to seizure of
taxpayer’s property in lieu of taxes); Phillips v. Comm’r, 283 U.S. 589, 595-96 (1931)
(affirming revenue collection by summary proceeding).

restricts voting rights, freedom of expression or political association.\textsuperscript{80} Thus, the Court has made it clear that most differential taxation schemes are not unconstitutional.\textsuperscript{81} The Court's succinct statement, "[a]bsolute equality is impracticable in taxation,"\textsuperscript{82} offers the best overview of the Court's view on the limited role of fairness in constraining the power to tax.

A related proposition is that the Supreme Court has declined to choose one tax scheme over another as the constitutionally permissible norm. In Container Corporation of America v. Franchise Tax Board, the Court gave deference to California's unitary tax system notwithstanding the fact that the result was to skew the tax base in California over other, more traditional methods of tax base determination.\textsuperscript{83} In myriad other contexts, the Court has expressly declined to adopt, as constitutionally approved, any single method of taxation, choosing instead to leave that choice to the Congress or state legislatures, as the facts of the case warrant.\textsuperscript{84}

B. Deference to Legislatures.

Long ago, the Court held that "the United States cannot be held liable for . . . its public and general acts as sovereign."\textsuperscript{85} Thus, so long

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (noting that as a general rule "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.") (citing McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Leathers v. Medlock, 499 U.S. 439, 453 (1991) ("[D]ifferential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."); see Marjorie E. Kohnhauser, The Morality of Money: American Attitudes Toward Wealth and the Income Tax, 70 IND. L.J. 119, 121 (1994) ("The history of the United States income tax shows that this differential treatment [generally referring to sensitivity to ability to pay] is not unusual.")
\item Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358, 358-87 (1991) (noting that it is for the state legislature to establish a "single constitutionally mandated method of taxation," not the Court); Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 341-43 (1989) (noting that states have broad powers to impose and collect taxes); Container Corp., 463 U.S. at 169-70 (finding that the Constitution imposes no single tax formula on the States); Moorman, 437 U.S. at 279 (holding that it is for Congress and not the Court to enact legislation requiring all States to conform to uniform rules for taxation).
\item Horowitz v. United States, 267 U.S. 458, 461 (1924) (citations omitted) (finding that
\end{enumerate}
\end{footnotesize}
as the Court finds that the government imposed the tax to perform essential government services or to fulfill a necessary government function, the Court can justify upholding the tax as necessary rather than as unfair or discriminatory. This deference to government authority supports the view that the high standard set by the Court can "be used to validate any action . . . [by the government] that is not demonstrably lunatic."

This deference to Congress or to state legislatures in matters relating to taxation is a theme that echoes throughout the Court's tax cases. Chief Justice Marshall expressed the same thought in 1830 when he said: "The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security . . . against unjust and excessive taxation . . . ." The underlying assumption of the Court is that the democratic process will, at some point, intrude to take the sting out of any rampant unfairness in taxation. There is a practical reason for this approach. It both eliminates the need to decide what is fair in taxation and provides a safety valve in the form of the democratic process. As the Court explained in Nordlinger v. Hahn, no matter how unfair the tax system might be, the Court has faith that the democratic system will rectify the unfairness.

C. The Threshold Required to Invalidate a Tax

The Court's reluctance to inject fairness as a factor when reviewing cases dealing with the taxing power underscores the apparent irrelevance of fairness as a deciding factor. The power to tax is circumscribed only when a very high threshold of arbitrariness or irrationality is met. Early cases started with the proposition that the government can impede the performance of its own contracts by sovereign acts).

86. Walter Guzzardi, Jr., What the Supreme Court is Really Telling Business, FORTUNE, Jan. 1977, at 149.
88. Id.
90. 505 U.S. at 17-18, quoting Bradley, 440 U.S. at 97. ("[The] Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we might think a political branch has acted.") Id.
91. For instance, the Court stated that:

[A] state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation – "to spoliation under the
the government's power to tax should not be unfettered. Hence in Loan Association v. Topeka, the Court seemed aware of and genuinely afraid of the government's taxation power and the resulting ability to wreak havoc within the tax system and upon citizens.\textsuperscript{92} As the Topeka Court explained, the power to tax "can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."\textsuperscript{93}

The Court in Brushaber v. Union Pacific Railroad Co. also espoused this approach, admonishing that a tax might fail if it "was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment . . . ."\textsuperscript{94}

Subsequent cases have not heeded the caution expressed in these cases and instead have deferred greatly to the legislatures. Nordlinger v. Hahn serves as the archetype for this other line of cases. In Nordlinger, the Court was asked to assess the constitutionality of California's property tax scheme under a state constitutional amendment that created dramatic disparities between taxpayers owning relatively similar properties. Through this acquisition-value assessment scheme, a long-time homeowner's property tax was based on an essentially frozen 1975-76 tax-year value, with an inflationary

guise of exerting the power of taxing.

Dane v. Jackson, 256 U.S. 589, 599 (1921) (citations omitted).

92. 87 U.S. (20 Wall.) 655, 662 (1874). ("A government . . . which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.") \textit{Id}.

93. \textit{Id.} at 664. Note the Topeka Court's recognition that a legitimate tax must strike the uneasy balance between providing the needed financial support of the government and being "sanctioned by time and the acquiescence of the people . . . ." \textit{Id.} at 665.

94. 240 U.S. 1, 24-25 (1916). This same thought is articulated by the Court in any number of its tax opinions. Further, the Court has said:

\[\text{[W]hen the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, . . . [w]e must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State.}\]


Where Equal Protection is concerned "inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a tax system that is not arbitrary in its classification, are not sufficient to defeat the law." \textit{Id.} (quoting Maxwell v. Bugbee, 250 U.S. 525, 543 (1919)).
cap not to exceed 2%. The Court noted that Stephanie Nordlinger, as a 1989 purchaser of a “modest” Los Angeles home worth $170,000, had a “general tax levied against her modest home... only a few dollars short of that paid by a pre-1976 owner of a $2.1 million Malibu beach front home.” In view of such disparity, Nordlinger claimed California’s tax scheme violated the Equal Protection Clause in that such a tax was “arbitrary or irrational.”

After analyzing California’s scheme of property taxation that explicitly favored long-time homeowners, the Nordlinger Court recognized that taxes may reflect a state’s belief that one taxpayer’s expectations are “more deserving of protection” than another taxpayer’s perceptions. Remarkably, both the Nordlinger majority and dissent explicitly conceded that this system of taxation is discriminatory and unfair. Justice Stevens, in his dissent, referred to California’s long-time homeowners as “Squires” and said such tax laws create “a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage.” But the majority refused to invalidate the tax even though they characterized it as a “grand experiment [that] appears to vest benefits in a broad, powerful, and entrenched segment of society, and... ordinary democratic processes may be unlikely to prompt its reconsideration or repeal.” In the majority’s words, the “standard [for evaluating challenges to tax laws] is especially deferential in the context of classifications made by complex tax laws.”

By allowing the tax, which it unceremoniously described as discriminatory and unfair, the Court seems merely to have paid lip service to its concern regarding dire consequences from taxes that transfer wealth from one class to another. Again, we see when it comes to taxes, the Court will not “second-guess state tax officials.”

95. Nordlinger, 505 U.S. at 5; CAL. CONST. art. XIII A.
96. Nordlinger, 505 U.S. at 6-7.
97. Id. at 8, 11 (citation omitted).
98. Id. at 13.
99. Id. at 29-30 (Stevens, J., dissenting).
100. Id. at 18 (citation omitted).
101. Id. at 11.
102. See Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655, 664 (1874) (noting that the taxation power “can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other...”)
103. Nordlinger, 505 U.S. at 25 (Thomas, J., concurring).
Barclays Bank PLC v. Franchise Tax Board of California also demonstrates the Court's reluctance to substitute its judgment for that of tax officials as to the limits of the taxing power. In Barclays, the Court upheld California's imposition of a franchise tax using a "worldwide combined reporting" method. Corporations operating in California were required to aggregate the income of their parent corporations, affiliates, and subsidiaries, including entities operating in other states and foreign countries. The state then taxed a percentage of the worldwide income equal to the average proportion of worldwide payroll, property, and sales in California. For example, in the first of the consolidated cases, the state used the income of Barclays Group, a multinational banking enterprise composed of over 220 corporations, to determine the tax liability for two independent members operating in California. The state found that the two members were part of a "worldwide unitary business," and assessed them approximately $153,000 in additional tax liability.

Although petitioners pointed out, and the Court acknowledged, that upholding the state's power to tax in this case meant that some taxpayers and not others were at risk for, or would be subject to, "multiple international taxation," the Court was still willing to uphold the tax as an inherent state power. Congress, not the Court, is given the power to decide whether the rights of taxpayers must yield to "tax uniformity" or to "state autonomy." If the Court is willing to endorse cases of multiple taxation among different taxpayers, it is relatively clear that the absence of fairness does not necessarily render the exercise of the sovereign's powers invalid.

D. Tax and the Constitution

If the absence of fairness is not, on its own, sufficient to warrant a finding that a legislature exceeds its authority in enacting a tax, what elements are required for such a finding?

While Nordlinger further clarified that the Court, for the most part, will not find a tax unconstitutional, the Court did concede that

105. Id. at 304.
106. Id.; CAL. REV. & TAX CODE § 25128 (West 1992). Once the average percentage was determined, that percentage of the total income of the large corporate entity as a whole would be the tax liability for the subsidiary.
108. Id. at 318-20.
109. Id. at 331.
heightened review might be justified on Equal Protection grounds if a tax impinged on the "exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic . . . ."\textsuperscript{110} However, even in those few instances in which a tax is found to be unconstitutional, the Court is quick to emphasize that a limitation of the legislature's taxing power is only grudgingly enforced.

The willingness of the Court to allow relatively constraint-free taxation, even within the bounds of such a fundamental right as freedom of speech, was evident in a recent case. In \textit{Leathers v. Medlock}, the Court again upheld the government's relatively unlimited ability to tax differentially.\textsuperscript{111} In this case, an Arkansas sales tax on cable television, with an exemption for other media such as newspapers, was found not to violate the First Amendment because the tax was not aimed at the cable company's First Amendment activities and the tax was not content-based. Asserting that the legislature has "especially broad latitude" when it comes to the creation of tax classifications, the Court stated: "[i]nherent in the power to tax is the power to discriminate in taxation."\textsuperscript{112}

1. \textit{Taxes and Equal Protection}

According to the Court's decisions, it appears that Equal Protection does not generally apply to economic disparities. Horizontal equity, discussed in Part II, evokes the essential of Equal Protection, with the former often serving as a proxy for the latter. To single out one sex or the other or a racial or ethnic group for harsher or more lenient treatment would be wrong,\textsuperscript{113} whether it be in the context of education, employment, or taxation. As mentioned in Part II, however, the Internal Revenue Code clearly affects some apparently equally-situated taxpayers differently.\textsuperscript{114} While two taxpayers may have the same income, the Code treats differently the

\textsuperscript{110} Nordlinger, 505 U.S. at 10.


\textsuperscript{112} \textit{Id.} at 451. However, see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 579-81 (1983), in which the Court held that the "use tax" on the cost of paper and ink products enacted by Minnesota violated the First Amendment because it singled out the press as a whole, and because of the exemptions, a small group of newspapers in particular. The Court feared that to allow this type of power to vest in the state, would allow the state to indirectly regulate and suppress the press. \textit{Id.} at 585. \textit{See also} Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).


\textsuperscript{114} Kornhauser, \textit{supra} note 42, at 619-20.
taxpayer who is chronically ill and incurs medical expenses, the
taxpayer who suffers a substantial casualty loss, and the taxpayer
whose income is derived from investments rather than labor. 115 Those
who recoup damages for non-physical injuries are treated differently
from those who suffer physical injuries. 116 Married women are treated
differently than unmarried women by having their income taxed at a
higher marginal rate owing to their husband's relatively high
income. 117 Such disparities seem not to have troubled the Court. 118

For example, in Kahn v. Shevin, in the face of an Equal
Protection challenge, Florida was permitted to discriminate against
widowers by not allowing them the $500 tax exemption given to
widows. 119 The Court found that the tax issue had a fair and
substantial relation to the object of the legislation (bringing balance
to the disparity between economic capabilities of men and women). 120
The Court noted that it has long held that "[w]here taxation is
concerned and no specific federal right, apart from [E]qual
[P]rotection, is imperiled, the States have large leeway in making
classifications and drawing lines which in their judgment produce
reasonable systems of taxation." 121

Similarly, in General Motors Corporation v. Tracy, the Court
held that an Ohio tax which exempted natural gas local distribution
companies (LDC's) from sales and use taxes did not violate the Equal
Protection Clause. 122 In denying General Motors, a buyer of out-of-
state natural gas, tax relief based upon an Equal Protection claim, the
Court explained that "state tax classifications require only a rational
basis to satisfy the Equal Protection Clause." 123 The Court flatly
upheld the power to tax differentially. "[I]n taxation, even more than
in other fields, legislatures possess the greatest freedom in

115. Id.
116. Laura Sager & Stephen Cohen, Discrimination Against Damages for Unlawful
Discrimination: The Supreme Court, Congress, and the Income Tax, 35 HARV. J. ON
117. Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional
118. Comm'r v. Kowalski, 434 U.S. 77, 95-96 (1977) (acknowledging that the system of
exclusions and deductions requires some degree of arbitrariness).
120. Id. at 352.
121. Id. at 355 (citations omitted).
122. 519 U.S. 278 (1997).
123. Id. at 311 (citations omitted).
classification.”

2. If Not on Equal Protection Grounds, Then On What Grounds?

If neither the First Amendment nor the Equal Protection Clause provides sufficient grounds on which to find a tax unconstitutional, what grounds would be sufficient? As noted above, the modern view holds that a tax can be found invalid if it serves a deterrent purpose seeking to completely bar an activity, if it is used exclusively to punish, or if it is harsh and oppressive. Even in the face of these articulated limitations, however, the Court is still hesitant to declare a tax unconstitutional unless it is a gross manipulation of the power to tax. As the Court in Madden v. Kentucky stated, “[s]ince the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons or classes.”

In Lunding v. New York Tax Appeals Tribunal, the Court used a test derived in its earlier decision in Supreme Court of New Hampshire v. Piper to strike a New York income tax which disallowed nonresidents a deduction for alimony. While the Court stated that the New York tax did not meet the burden of proving “(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective [of attempting to tax nonresidents’ in-state activities],” in striking down the tax, the Court stated that the Privileges & Immunities clause “affords no assurance of precise equality in taxation between residents and nonresidents of a particular State.”

Given the foregoing, the wide latitude the Court grants the taxing officials, and the Court’s assertion that it defers to the sovereign’s exercise of “experimental” taxation powers, one may

124. Id. (citing Madden v. Kentucky, 309 U.S. 83, 88 (1940)).

125. This framework is more fully described in an earlier work. Leo P. Martínez, Of Fairness and Might: The Limits of the Sovereign Power to Tax After Winstar, 28 ARIZ. ST. U. L.J. 1193, 1196-1210 (1996). For the reader’s convenience, I summarize the relevant portions of that piece.


128. Lunding, 522 U.S. at 294 (quoting Piper, 470 U.S. at 284).

129. Lunding, 522 U.S. at 297.
wonder just how far the sovereign may go in imposing taxes before reaching the threshold of harsh and oppressive.\textsuperscript{130} It is clear that to be deemed harsh and oppressive, a legislature would have to border on the irrational.\textsuperscript{131} The Court, no matter how compelling the arguments against a particular tax, is not inclined to intrude into what it sees as a purely legislative judgment.\textsuperscript{132}

The holdings in these cases harmonize with the Court’s previous refusal “to hold that narrow exemptions from a general scheme of taxation necessarily render the overall scheme invidiously discriminatory.”\textsuperscript{133} As the Court concluded in \textit{Lunding}, “where the question is whether a state taxing law contravenes rights secured by [the Federal Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.”\textsuperscript{134}

\textbf{E. Making Sense of it all}

Tax legislation, then, quite plainly is unique.\textsuperscript{135} The extreme reluctance to second-guess the taxing authorities reveals the Court’s implicit support for the proposition that taxes play a vital role in the existence and functioning of the government. For the sake of preserving this vital power to tax and the government’s fiscal health, the Court appears willing to defer to sovereign taxation powers and to sacrifice taxpayer concepts of fairness or fair play, even if this means allowing the government to shift its tax burdens and benefits in ways that are discriminatory and unfair.

Notwithstanding the notion that fairness or equity limits the power to tax, the deference to legislative power is thematic, and carries through the Court’s opinions on all tax matters. What we are left with, whether satisfactory or not, is that “the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide.”\textsuperscript{136} Accordingly, “[t]he

\textsuperscript{131} Vance v. Bradley, 440 U.S. 93, 97 (1979).
\textsuperscript{132} Id. at 111-12.
\textsuperscript{133} Nordlinger, 505 U.S. at 16-17.
\textsuperscript{134} Lunding, 522 U.S. at 297 (quoting Shaffer v. Carter, 252 U.S. 37, 55 (1919)).
\textsuperscript{135} This is my unalterable view. A mild, though well-reasoned, disagreement with my position exists. See David A. Hyman, \textit{Procedural Intersection and Special Pleading: Is Tax Different?}, 71 Tul. L. Rev. 1729 (1997).
'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have almost equally strong claim to favored treatment be placed on different sides of the line,' and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."\textsuperscript{137} The Court is consistent in its determination that the democratically elected legislature is the place to hash out tax policy. As Chief Justice Marshall summarized (while expressing his relief), the U.S. Supreme Court should not be "driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use . . . ."\textsuperscript{138}

\section*{IV. A Polemic}

If the Supreme Court defers to legislatures even in instances that seem to violate the horizontal equity principle as it did in Nordlinger, what does this mean for fairness as a viable legal norm?

It may be that tax policy is, in fact, a product of a long-term, multi-tiered system of complicated interlocking forces. Beginning with the proposition that there is nothing magically fair, or even unfair, about the current status quo, and proceeding through examples of ways in which one tax policy (for instance a deduction) must be offset by another (a concurrent shifting of the burden elsewhere), such a course of thought could show that fairness depends on the scope of the inquiry. Under such an analysis, what appears unfair this year for a certain taxpayer may be only the immediate manifestation of an overall policy towards achieving greater fairness for a whole class of taxpayers, or for the system overall.\textsuperscript{139}

Alternatively, by emphasizing the unfairness of tax discrimination based on a lack of mobility or erroneous tax classifications, one could argue that the use of the notion of fairness in tax policy is analogous to Professor Peter Westen's idea that notions of equality (read "horizontal equity") merely mask the more


\textsuperscript{138} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430 (1819).

\textsuperscript{139} See, e.g., William G. Gale & Jeffrey Rohaly, Three-Quarters of Filers Pay More in Payroll Taxes Than in Income Taxes, 98 TAX NOTES 119 (2003) ("About 74 percent of filers owe more payroll taxes (including the employer portion) than individual income taxes . . . . The payroll tax is sharply regressive with respect to current income (that is, the average tax rate falls as income rises), whereas the income tax is progressive. The regressivity of the payroll tax is mitigated to a substantial extent if Social Security and Medicare benefits are included as well.").
fundamental underlying rights being violated, such as the Equal Protection Clause of the Constitution.\textsuperscript{140} In such situations, fairness is, in fact, substantive in that it does refer to clearly defined constitutional rights. This suggests the possibility that the framers of the Constitution were trying, among other things, to put into words all those intuitively childish notions that form the basis of most moral and religious systems (treat others as you would have them treat you, do not steal, etc.)\textsuperscript{141} Of course, although there may be evidence to the contrary, our system of government cannot operate at a first-grade level.\textsuperscript{142} Simple notions of morality are not easily put into practice for regulating the economy.\textsuperscript{143}

Another challenge inherent to this invocation of morality is evident in the common criticism of politics, namely that it is driven not by the people but by a select group of well-placed corporations and interest groups. Politicians are well versed in spinning whatever policy they currently wish to implement in such a way as to make it conform to notions of fairness, family values, or apple pie. All of this begs the question whether fairness has real meaning apart from use as a rhetorical device.

An inherent part of our political system is that, should one administration fail to live up to the public’s notions of fairness, apple pie and the American way (or, more cynically, at least fail to sufficiently market these ideas to the correct demographics), that same public can “throw the bums out.” Yet what fairness means in such a context is perhaps unknowable. People tend to remember certain key events (assassination of JFK, low taxes and big deficits in the eighties, Monica Lewinsky), which they then use as heuristics in identifying larger, and much more complex portions of history. Bill Clinton, for example, will forever be associated with thong panties, blue dresses from the Gap and other sordid details no sensible person should desire to have taking up valuable cranial space, while the increase in the top marginal tax rate to 39.6% would seem to be a non-starter to a critique of his presidency. By contrast, Stephanie

\textsuperscript{140} See Peter Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537, 580-81 (1982) (noting that by subsuming constitutional rights “under the ‘catchall’ proposition that ‘likes should be treated alike,’” equality masks the existence of those substantive rights).

\textsuperscript{141} The aphorism, “[a]ll I really need to know... I learned in kindergarten” comes to mind. ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS 6 (1989).

\textsuperscript{142} Perhaps it is this that has led some to question the normative appeal of equality. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 480 (4th ed. 2001).

\textsuperscript{143} See, e.g., Enron.
Nordlinger will remember well a certain tax change; indeed, it probably will be a defining moment in her life. For her, fairness and unfairness have a very real significance.

But at what level of inequity will the people rise up and say "no more"? The many small inequities that plague everyone from day to day tend to fade into the background. Like the noise of traffic or that of the garbage truck coming around at 6:00 a.m. every Thursday, tax inequities become a necessary part of participating in the modern world. Petty unfairness may therefore make us grit our teeth and contribute to our overall sense that perhaps something is not quite right with the state of Denmark; and, perhaps around election time, a certain candidate strikes a chord that resonates with this feeling of disenchantment. But revolutions are not made of such stuff.

In searching for the simplest mechanism that seems to govern our sense of fairness in taxation, two ideas emerge. First, we seem to accept distinctions in horizontal classification that make sense. Second, no taxpayer is locked into any particular category, but rather, at least in theory, each has the option of upward (or downward) mobility. Each of these ideas is developed below.\textsuperscript{144}

A. Making Sense of Horizontal Equity

We accept what makes sense to us. As a result, distinctions in horizontal classifications often are best defended or justified on very basic public policy grounds. The home mortgage deduction, for example, encourages the virtue of home ownership with consequent stability, and it also provides a not-so-indirect benefit to the construction industry.

Professor Musgrave's dismissal of horizontal equity as a device reduced to a guard against malicious prosecution was too quick.\textsuperscript{145} While a tax lottery might be "fair" in the sense that we all would get the chance to pay some random tax, the system would not make common sense. According to my view, it would, as a result, not be fair.

B. Mobility (among classifications)

The existence of mobility between horizontal classification is

\textsuperscript{144} See also Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Expenditures, 83 Harv. L. Rev. 705, 708-13 (1970) (attempting to make sense of the federal budget and the tax system by describing various deductions and exclusions as "tax expenditures").

\textsuperscript{145} Zolt, supra note 54, at 96 n.214.
similarly important. Those aspects of a taxpayer that define a
category of "similarly situated" are not immutable characteristics.
Thus, I can aspire to Bill Gates' level of wealth. I can give to charity.
I can own my own home. Through such choices, I can determine and
I can control, within bounds, what my tax burden will be.\footnote{146}

This latter factor, mobility, has limitations. There are immutable
characteristics that deserve protection, for example, differential
taxation based on race would not be accepted. However, there are
limits to the principle. First, outside of taxation there are immutable
characteristics that do not receive protection. Height is an example.
The systematic exclusion for the National Basketball Association
(NBA) of those of my height, while outrageous, does not give room
for me to initiate a class action against the NBA. Perhaps, this is
because height, historically, has not been a characteristic used to
justify political abuse or discrimination in the same way as have race
and sex. Hence, the jurisprudential developments surrounding the
Civil Rights Act and the Equal Protection Clause have not
concentrated on height as a suspect classification.

Economic regulation falls in the same category of limitations that
do not receive protection. This is partly due to the mobility principle
and partly because the legislative process allows a safety valve, in the
form of the democratic process.

The other area of limitation is where an apparently innocent
statute or regulation affects one group more than another. This more
insidiously reflects Anatole France's observation on "the face of the
majestic equality of the laws, which forbid rich and poor alike to sleep
under the bridges, to beg in the streets, and to steal their bread."\footnote{147}

Much of the scholarship criticizing the fairness of the Internal
Revenue Code is based on this aspect of the mobility principle. The
argument is that, while facially neutral, the Code is de facto
discriminatory. Racial minorities and same-sex couples illustrate the
point.\footnote{148} For example, even when controlling for income, the I.R.C.

\footnote{146} I realize this is where I depart from theories of horizontal equity. All of these
examples, except maybe charitable giving, seem to me to demonstrate differences in
vertical equity. Mobility, to me, implies movement up or down, not merely side to side.
An interesting gloss on this is the exploration of the treatment of taxpayers who reside in
different parts of the country. \textit{See} Michael S. Knoll \& Thomas D. Griffith, \textit{Taxing Sunny
Days: Adjusting Taxes for Regional Living Costs and Amenities}, 116 \textit{Harv. L. Rev.} 987,
988-89 (2003). My observation would be that because the choice of my residence is up to
me, the mobility principle would not be violated in such instances.

\footnote{147} \textit{Anatole France}, \textit{The Red Lily} 91 (Winifred Stevens trans., 1925).

\footnote{148} \textit{See}, e.g., Patricia A. Cain, \textit{Heterosexual Privilege and the Internal Revenue Code},
still treats African-Americans differently because of different patterns of living and consumption. African-Americans, according to one study, are more likely to lead lives that do not exploit the tax benefits of the I.R.C. as others. If true mobility, which the Code presumes to be possible, is actually unattainable, then the Code must be viewed as unfair. The inequalities that stem from this lack of true mobility and those inherent to the I.R.C. discussed by Professors Moran and Whitford are exacerbated further by the fact that socio-economic inequities are not the inequities to which constitutional law and disparate impact analysis have afforded much protection. Though the Court in Nordlinger upheld the California taxing scheme, it did come close to acknowledging the need for such protection when it recognized that the California scheme was irrational and unfair, while concluding that the legislature is the vehicle by which to seek redress.

C. Violations of the Common Sense/Mobility Principles

Where either the common sense or the mobility principle is violated, the reaction is sure and swift. Where there is perceived inconsistency or unfairness in the system, there is heard a cry to refine or modify it.

An historical review of selected notorious examples of instinctual


Blacks have less of the type of investment wealth which benefits from the realization requirement and special rates for capital gains. Blacks also receive fewer gifts and inheritances, a form of tax free accessions to wealth. When blacks do have wealth, they are more likely to invest in assets that are not tax favored, such as vehicles. Blacks do invest in homes, the primary asset for most American families, but black homes are on average less valuable and generally appreciate at a slower rate than white homes. As a result, the homeownership tax benefits, particularly the deductibility of home mortgage interest and property taxes, are more beneficial to whites than blacks.

Id. at 799-800.

150. Id at 757.

151. Knoll & Griffith, supra note 142, at 988-89 (arguing that misallocation of capital and labor is the cost of failing to account for geographical differences in income and cost of living).

and spectacular reactions to perceived unfairness in the allocation of tax burdens illustrates the point. Indeed anecdotal (read "rough-hewn empirical") evidence of this proposition abounds in history and in pseudo-history.\footnote{153. \textsc{Carolyn Webber \& Aaron Wildavsky}, \textit{A History of Taxation and Expenditure in the Western World} (1986); George Guttmann, \textit{IRS Tax Amnesty}, 22 Tax Notes 1361 (1984); \textsc{Dall W. Forsythe}, \textit{Taxation and Political Change in the Young Nation} 1781-1833 60-61 (1977); \textsc{Robert J. Haws}, \textit{A Brief History of American Resistance to Taxation, in Income Tax Compliance}, 1983 A.B.A. Sec. on Tax’n 113; \textsc{Cyril Northcote Parkinson}, \textit{The Law and the Profits} 22-35 (1960).}

Examples include the legendary Lady Godiva, an English noblewoman who rode naked through Coventry to persuade her husband, Earl Leofric of Mercia, to lighten the taxes on his subjects.\footnote{154. \textsc{Random House Webster's College Dictionary} 563 (2d ed. 2000) (Godiva defined).} Our own Boston Tea Party and the 1794 Whiskey Rebellion were both grounded in popular opposition to unpopular taxes.\footnote{155. \textit{See Slemrod \& Bakiya, supra} note 6, at 50; \textsc{Webber \& Wildavsky, supra} note 149, at 31; \textsc{Haws, supra} note 149, at 113; \textsc{Forsythe, supra} note 149, at 60; \textsc{Parkinson, supra} note 149, at 22-35.} In 1773 Boston, a group of men disguised as Native Americans forced their way aboard Boston-bound ships which carried tea destined for sale to colonists.\footnote{156. \textsc{Charles A. Beard et al.}, \textit{The Beards’ New Basic History Of The United States} 106 (1968).} In order to protest the British Tea Act, they dumped the tea in Boston Harbor.\footnote{157. \textit{Id.; see also Encyclopedia Britannica, 2 Micropedia Ready Reference} 405 (15th ed. 2003). The protesters were soon disillusioned when the British government failed to yield and instead the Parliament enacted a statute which served to close the port of Boston to all trade by sea. \textsc{Beard et al., supra} note 152, at 106.} A few years later, when Congress passed a bill raising the excise tax on liquor, Pennsylvania farmers who made whiskey banded together and refused to pay the tax.\footnote{158. \textsc{Beard et al., supra} note 152, at 106; \textit{see also Encyclopedia Britannica, 12 Micropedia Ready Reference} 623-34 (15th ed. 2003).} As a consequence, President Washington was forced to call upon 13,000 militia in order to end this defiance of federal authority.\footnote{159. \textsc{Beard et al., supra} note 152, at 106 (1968).}

More recently, in the late 1980’s, the Thatcher government in England introduced a poll tax under which every man and woman over age 18 was subjected to the same absolute level of tax.\footnote{160. \textit{Barbara Amiel}, \textit{A Taxing Lesson for the Iron Lady}, \textit{Maclean’s}, Apr. 16, 1990, at 13.} The resulting reaction was a violent protest of an almost unprecedented scale – the most serious incident involved hundreds of people who
fought a bloody battle with police in London’s East End. The tax and the reaction to it are credited with the demise of the Thatcher government and the diminution of the fortunes of the Conservative Party.

In this country in the late 1980's, an example of this sentiment was introduced in Congress as Senate Bill 604 and would have been entitled, if enacted, the “Omnibus Taxpayers’ Bill of Rights Act.” Not surprisingly, the Taxpayers’ Bill of Rights enjoyed popular political support. This support was not only derived from the traditional enmity reserved for the tax collector but also from documented incidents of abusive and, in a few cases, criminal conduct directed against taxpayers by Internal Revenue Service (“I.R.S.”) employees. Predictably, at least one of the authors of the bill charged that under the current system, the I.R.S. “ha[d] too many rights, and the taxpayer too few.”

161. Andrew Phillips, A Bloody Tax Revolt, MACLEAN’S, Mar. 19, 1990, at 22. In reaction to the revolt, 38 Tory members of Parliament broke with their party and voted for an amendment which would have introduced a rudimentary link between income and levels of taxation. Scrap Poll Tax, THE ECONOMIST, Apr. 23, 1988, at 14, 17.

162. SLEMMERD & BAKJIA, supra note 6, at 49.

163. S. 604, 100th Cong. (1987). The Bill was introduced on February 26, 1987 by Senators Pryor (D. Ark.), Grassley (R. Iowa) and Reid (D. Nev.) for the ostensible purpose of promoting and protecting taxpayer rights. Id. Senate Bill 604 is modeled on Senate Bill 579 introduced by Senators Reid, Nickles and Breaux as “The Taxpayers’ Bill of Rights Act.”


166. Press Release, Senator Charles E. Grassley, supra note 160. One of the principles espoused by the Taxpayers’ Bill of Rights was to shift the burden of proof in tax cases to the I.R.S. At the time, I criticized the notion and feared that my musings would be seen as stating the obvious. Leo P. Martinez, Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases, 39 HASTINGS L.J. 239, 242-43 (1988). Imagine my surprise when the burden shifting idea gained currency, and in fact, ten very short years later, became part of the fabric of the Code. See I.R.C. § 7491 (2004).
D. The Slight Risk of Overstatement

By reducing the tests for determining fairness to the absurdly simple, I pause to emphasize that the approach above is simplistic in the extreme. Moreover, it does not account for those situations, such as Nordlinger, in which common sense seems to have taken flight and there is still no hue and cry to reform the system. Still, the point is that the simplistic seems to be the rule. If the judiciary is prone to defer to the legislative will and if the threshold for invalidating taxes remains high, we are left what one researcher has concluded, and that is: “[F]airness is what people say it is.”\(^{167}\) It is then only a small step with a minimal risk of overstatement to say that at its core, this is nothing more than a child’s intuitive view of the world.

In essence, it is likely that taxpayers, like all individuals, and similarly, first-graders, want to be treated “fairly.” As shown above, taxpayers react to tax situations that they perceive as unfair. Reminiscent of the adage regarding bad art and Justice Stewart’s view of obscenity,\(^ {168}\) individuals know unfairness when they see it. Perhaps they also know fairness when they see it, but fairness is difficult to identify clearly in the whirl of spinning punditry.\(^ {169}\)

Conclusion

Understandably, then, that only in situations involving more identifiable violations of constitutional rights can tax policies be said, with any certainty, to be fair or unfair. In the area of constitutional rights carrying the weight of solid precedent, the Supreme Court ostensibly knows what it is doing. In the area of taxation, however, it may feel more adrift; and, as in many such cases in which the law does not point in any one certain direction, the Justices may engage in the favored practice of tossing the ball back to Congress for further play.

It is tempting to conclude that fairness is not relevant to taxation. However, this would contradict the wide acceptance fairness has correctly received in the formulation of tax policy. Indeed, one could not plausibly argue that a lack of fairness is the characteristic of any tax system. We would be left with an unprincipled lack of intellectual defensibility of tax policy.

Professor Alexander Bickel once said that “[n]o good society can

\(^{167}\) Minarek, supra note 67, at 23.

\(^{168}\) The quote is “I know it [i.e., obscenity] when I see it.” Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

be unprincipled; and no viable society can be principle-ridden.”\textsuperscript{170} He went on to state that judicial review is “the principled process of enunciating and applying certain enduring values of our society.”\textsuperscript{171} Yet, thus far, the Supreme Court has been reluctant to incorporate the notion of fairness in its review of taxation. Perhaps this is because fairness, while an enduring value of our society, has not developed beyond a child-like notion. Thus we should not be surprised that notions like fairness and horizontal equity have failed to find a constitutional voice.


\textsuperscript{171} Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 58 (1962).