UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 93 | Number 3 Article 8

3-1-2015

Syntax on Sin Tax: The Supreme Court of North Carolina Invigorates the Just and Equitable Tax Clause

K. Dawn Milam

Syntax on Sin Tax: The Supreme Court of North Carolina Invigorates the Just and Equitable Tax Clause*

> *[E]quity is a law in our hearts; it conforms to no rule, but to circumstances, and decides by the consciousness of right and wrong.*
>
> —*George Crabb*[1]

INTRODUCTION

The North Carolina Constitution requires the power of taxation to be "exercised in a just and equitable manner."[2] For seventy-eight years after the language was adopted by amendment, the Supreme Court of North Carolina made perfunctory references to the Just and Equitable Tax Clause without addressing it as a substantive claim.[3] In 2013, Internet gambling parlors successfully challenged high license fees imposed on them by the city of Lumberton.[4] The court agreed with the businesses that the new taxes were not "just and equitable," and for the first time expressly held that the Clause functions as a substantive limitation on the government's power to tax.[5] But the court did not interpret the constitutional language or articulate a standard for applying the Clause, leaving its parameters yet to be determined.[6]

1. GEORGE CRABB, CRABB'S ENGLISH SYNONYMES 467 (Centennial ed. 1917).

2. N.C. CONST. art. V, § 2(1); *see also* IMT, Inc. v. City of Lumberton, 366 N.C. 456, 457, 738 S.E.2d 156, 157 (2013) ("While the decision to levy a privilege license tax is within the discretion of legislative entities, any tax so levied must be just and equitable."). The Supreme Court of North Carolina has referred to this language as the "Just and Equitable Tax Clause." *See, e.g.*, *Lumberton*, 366 N.C. at 457, 738 S.E.2d at 157.

3. *See Lumberton*, 366 N.C. at 459, 738 S.E.2d at 158 ("While the Just and Equitable Tax Clause has been cited in several decisions, it has not been directly addressed as a substantive claim in its own right.").

4. *See id.* at 458–59, 738 S.E.2d at 157–58.

5. *See id.* at 457–58, 738 S.E.2d at 157.

6. *Id.* at 462, 738 S.E.2d at 160 ("If the Just and Equitable Tax Clause has any substantive force, as we hold it does, it surely renders the present tax invalid. In light of the unusual facts we confront in the present case, and cognizant of the nearly universal deference by courts to legislative tax classifications, we do not attempt to define the full parameters of the Just and Equitable Tax Clause's limitations on the legislative taxing power.").

Meanwhile, the North Carolina legislature radically overhauled the state's tax code.[7] While dramatically reducing income taxes for wealthy residents,[8] lawmakers increased the sales tax on mobile homes to a rate higher than comparable rates for either vehicles or site-built homes.[9] Both the General Assembly's expansive tax restructuring and the decision in *IMT, Inc. v. City of Lumberton*[10] ("*Lumberton*") illuminate the complex political and moral considerations that influence tax policy. Though traditional criteria of horizontal and vertical equity provide a structure for analysis,[11] a "fair" tax system is ultimately a function of one's conception of economic justice.

This Recent Development explores whether the Supreme Court of North Carolina could apply principles of tax fairness to overturn

7. *See* Jeanne Sahadi, *North Carolina's Republican Tax Experiment*, CNN MONEY (Aug. 8, 2013), http://money.cnn.com/2013/08/08/pf/taxes/tax-reform-north-carolina/. Part of the proposal included a modified flat tax, which lowered the income tax rate on North Carolina's highest earners from 7.5% to 5.8%. Derick Waller, *Lower NC Flat Tax Starts Wednesday, But Many Will Still Pay More*, WNCN NEWS (Jan. 13, 2014), http://www.wnct.com/story/24332326/lower-nc-flat-tax-takes-effect-wednesday-but-many-will-pay-more.

8. *See* Mark Binker, *Breaking Down the 2013 Tax Package*, WRAL (July 19, 2013), http://www.wral.com/breaking-down-the-2013-tax-package/12678653 (noting that "[b]oth proponents and opponents of the plan acknowledge that the biggest breaks will go to the highest income earners").

9. *Compare* N.C. GEN. STAT. § 105-228.30(a) (2013) (imposing a 0.2% tax on transfers of real property), *and* Act of May 29, 2014, ch. 3, § 6.1(g), __ N.C. Sess. Laws __, __ (to be codified at N.C. GEN. STAT. § 105-187.3) (imposing a 3% highway use tax on the transfer of title to a motor vehicle), *with* N.C. GEN. STAT. § 105-164.4(a) (2013) (imposing the general sales tax rate of 4.75% on the sale of "manufactured homes").

10. 366 N.C. 456, 738 S.E.2d 156 (2013).

11. *See infra* note 61 and accompanying text. Though this paper begins with the commonly identifiable theories of horizontal and vertical equity, an individual's beliefs about the world, experiences, and even religious faith will influence what she accepts as a "fair" application of these principles. *See, e.g.*, Patrick B. Crawford, *Analyzing Fairness Principles in Tax Policy: A Pragmatic Approach*, 76 DENV. U. L. REV. 155, 179 (1998) ("All tax systems, progressive or flat, overtly redistributive or not, are moral schemes of consumption. It is a mistake to think that not taxing the rich at higher rates (and thus more) is somehow value-free or value-neutral."); Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 673 (2006) (applying "the moral principles of Judeo-Christian ethics to the fundamental federal tax policy issues addressing the morally required level of revenues that must be raised and how the tax burden should be allocated among taxpayers at different levels of income and wealth"); Ajay K. Mehrotra, *"Render Unto Caesar . . . ": Religion/Ethics, Expertise, and the Historical Underpinnings of the Modern American Tax System*, 40 LOY. U. CHI. L.J. 321, 323 (2009) (exploring "the religious and ethical underpinnings of our modern tax system"). Even decisions about what is "like" or "unlike" treatment rely on some other source of valuation. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 546–47 (1982) ("Just as no categories of 'like' people exist in nature, neither do categories of 'like' treatment exist; treatments can only be alike in reference to some moral rule.").

statutes that disproportionately harm the poor, not just those that harm business interests. The paper then contemplates whether judicial review of tax policy is an effective and desirable mechanism to address questions of economic justice. Part I presents the history of the Just and Equitable Tax Clause and the background and reasoning of *Lumberton*. Part II applies traditional tax equity principles both to assess the *Lumberton* court's analysis and to pose a theoretical challenge to the mobile home sales tax increase. Part III considers the role of the judiciary in determining fiscal policy and evaluates the respective effectiveness of the political process and the courts in promoting meaningful public debate about economic justice.

I. BACKGROUND AND RECENT VITALIZATION OF THE JUST AND EQUITABLE TAX CLAUSE

A. The Just and Equitable Tax Clause: Adoption and Application

The Just and Equitable Tax Clause ("the Clause") requires that "[t]he power of taxation . . . be exercised in a just and equitable manner."[12] The Clause was part of an amendment crafted by the General Assembly and adopted by North Carolina voters in 1935.[13] Prior to the amendment, all taxes on property—except home loans—were assessed on a strictly uniform *ad valorem* basis.[14] The tax provisions in the amendment replaced this requirement with a more expansive grant of discretion to the legislature.[15] The new tax provisions allowed the legislature to classify different types of property and consider other facts and circumstances to determine property taxes.[16] But this broad taxation power came with a limit: it must be exercised in a "just and equitable manner."[17]

12. N.C. CONST. art. V, § 2(1).

13. *See* Act of Apr. 29, 1935, ch. 248, § 1, 1935 N.C. Sess. Laws 270, 270 (ratified by popular election and codified as amended at N.C. CONST. art. V, § 2(1)).

14. M. T. Van Hecke, *A New Constitution for North Carolina*, 12 N.C. L. REV. 193, 193–94 (1934). An *ad valorem* tax is "imposed proportionally on the value of something . . . rather than on its quantity or some other measure." BLACK'S LAW DICTIONARY 1469 (7th ed. 1999).

15. Van Hecke, *supra* note 14, at 194 ("The proposed new constitution removes all of these limitations and substitutes four new ones: (1) The taxing power must be exercised in a just and equitable manner and only for public purposes; (2) local taxes may only be levied in accordance with general laws and under state supervision of local budgets and tax levies; (3) taxes for debt service are to be diminished by new limitations upon the creation of state and local indebtedness; and (4) the Governor is given the veto power over all legislation, including tax laws, not subject to popular vote." (citations omitted)).

16. *Id.* at 194–96.

17. *Id.* at 195–96.

At the time the Just and Equitable Tax Clause was added to the North Carolina Constitution, at least one scholar believed that the Clause would indeed function expressly as a mechanism for judicial review. M. T. Van Hecke, then Dean of the University of North Carolina School of Law, published an article in the *North Carolina Law Review* to explain the key changes in the state constitution.[18] He wrote to assuage concerns of "arbitrary and discriminating legislative action" that some North Carolinians feared the expansive new taxing power might engender.[19] Van Hecke argued that courts could assess fair treatment in taxation just as they did in due process and equal protection matters:

> The new limitation that "the power of taxation shall be exercised in a just and equitable manner" invokes this protection. That this will give rise to new legislative and judicial problems of no inconsiderable factual difficulty, is not to be denied. That these difficulties are not prohibitive is evident from our experience with taxes levied on sources other than property.[20]

For Van Hecke, the complexities created by judicial review did not prevent the Clause from operating as a meaningful limitation on the legislature.

In spite of Van Hecke's prediction, before the *Lumberton* decision, the Supreme Court of North Carolina had primarily cited the Clause either as part of the Public Purpose doctrine,[21] which provides that taxation must benefit the public rather than the private sector, or in conjunction with the provisions for property taxes in Article V, Sections 2(2), 2(3), and 2(5) of the state constitution.[22]

18. *Id.* at 193. The new tax provisions replaced the constitution's strict uniformity requirements and allowed the legislature more latitude in classifying property. *Id.* at 194–95. Van Hecke explained that the uniformity requirements had, for instance, prevented the legislature from providing relief to "unproductive property" during the Depression. *Id.* at 195. He argued that the new provisions allowed the legislature to consider a number of contextual facts in assigning property tax values that would bring property taxes in line with other forms of taxation in the state. *Id.*

19. *Id.* at 195.

20. *Id.* at 196.

21. N.C. CONST. art. V, § 2(1); *see* Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001); Maready v. Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 619 (1996).

22. *See* Smith v. State, 349 N.C. 332, 340–41, 507 S.E.2d 28, 33 (1998); *In re* Martin, 286 N.C. 66, 75–76, 209 S.E.2d 766, 773 (1974). Subsection 2 allows the General Assembly to classify property for tax purposes, but only by "general law uniformly applicable in every county, city and town, and other unit of local government." N.C. CONST. art. V, § 2(2). Subsections 3 and 5 repeat this phrase as a requirement for tax exemptions and property taxes, respectively. N.C. CONST. art. V, § 2(3), (5).

However, the court had never interpreted the language or applied the Clause as a distinct substantive limitation on tax policy.[23]

In fact, only two of the early cases appear to address the Clause directly, although both holdings principally rest on other doctrines. In *State v. Harris*,[24] the court overturned a state license tax that applied only to businesses in certain locations.[25] The court cited the Just and Equitable Tax Clause and explained that "[i]t cannot be successfully maintained that a tax . . . is equitably levied when a large number of the counties of the State are not included and citizens therein engaged in a like business are left immune from the tax."[26] In *Nesbitt v. Gill*,[27] the court upheld a graduated license tax on horse salesmen.[28] Briefly referencing the Just and Equitable language, the court reasoned that exemption from other taxes may weigh in favor of a license tax's validity.[29] Instead of a check on legislative tax decisions, the Clause had become a mere preliminary incantation.

B. IMT, Inc. v. Lumberton[30]*: Just and Equitable as a Substantive Limitation*

In 2010, the City of Lumberton ("City") amended the formula for privilege license taxes[31] on businesses where " 'persons utilize electronic machines . . . to conduct games of chance.' "[32] In prior

23. *See* IMT, Inc. v. City of Lumberton, 366 N.C. 456, 459, 738 S.E.2d 156, 158 (2013) ("While the Just and Equitable Tax Clause has been cited in several decisions, it has not been directly addressed as a substantive claim in its own right.").

24. 216 N.C. 746, 6 S.E.2d 854 (1940).

25. *Id.* at 753, 6 S.E.2d at 859 ("[A]ny law which, purporting to operate on a particular class, places upon those engaged in the business in a portion of the State a burden for the privilege which is exercised freely and without additional charge by those engaged in the business in other parts of the State, is arbitrary in classification because it discriminates *within* the class originally selected and extends to the latter a privilege and immunity not accorded to those who must, under the law, pay the additional exaction or quit the business.").

26. *Id.*

27. 227 N.C. 174, 41 S.E.2d 646 (1947).

28. *Id.* at 180, 41 S.E.2d at 651. The challenged statute provided for a graduated license tax that increased the amount owed according to the number of horses and/or mules purchased for resale. *Id.* at 177, 41 S.E.2d at 648–49.

29. *Id.* at 178–80, 41 S.E.2d at 649–51 (explaining that the sales of horses and mules were exempt from the 3% state sales tax).

30. 366 N.C. 456, 738 S.E.2d 156 (2013).

31. Privilege license taxes are "imposed for the privilege of carrying on the business, exercising the privilege or doing the act named in Article 2, Schedule B of the Revenue Laws of North Carolina." *Scope and Nature—Rules and Bulletins*, N.C. DEP'T OF REVENUE, http://www.dornc.com/taxes/license/scope.html (last visited Feb. 17, 2015).

32. *Lumberton*, 366 N.C. at 458, 738 S.E.2d at 157 (alteration in original) (quoting LUMBERTON, N.C., CODE § 12-60.1(15) (2013), *available at* https://www.municode.com/library/nc/lumberton/codes/code_of_ordinances?nodeId=14291).

years, the privilege license tax on such establishments had been a fixed annual amount of $12.50.[33] The new calculation taxed both the business location and the number of computer terminals at the location.[34] At $5,000 per location and $2,500 per computer, each cyber gaming establishment would owe a minimum tax of $7,500.[35] The amounts actually levied on the four companies challenging the tax ranged from $75,000 to $137,500.[36]

Several businesses sued the City to prevent enforcement of the tax, but the trial court granted and the court of appeals affirmed summary judgment for the City.[37] Responding to the businesses' argument that the tax violated the Just and Equitable Tax Clause in Article V, Section 2(1) of the North Carolina Constitution, the Court of Appeals of North Carolina applied common law principles to determine that the tax was indeed constitutional.[38] The central doctrine of Just and Equitable, according to the court of appeals, was grounded in the common law axiom that a "tax must not be so high as to amount to a prohibition of the particular business."[39] It was the relationship between the privilege license tax and the establishment's revenue—not the prior tax—that determined the new tax's validity.[40]

In a dissenting opinion, Judge Robert C. Hunter acknowledged the common law prohibitive tax standard but suggested that the variation in the privilege license tax structure should preclude summary judgment.[41] Judge Hunter argued that the significant disparity between the high taxes levied on cyber gaming establishments and the "modest" taxes imposed on other businesses should be at least a consideration in the equity of the tax.[42]

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* Cyber gaming establishments can generate a "tremendous amount of money, hundreds of millions of dollars[,]" according to Ohio Attorney General Mike DeWine. Pamela M. Prah, *States Battle Illegal Gambling at Internet Cafes*, USA TODAY (Mar. 24, 2014), http://www.usatoday.com/story/news/nation/2014/03/24/stateline-illegal-gambling-internet-cafes/6829731/. Noting the problem with "largely unreported profits," the American Gaming Association recommends that states strictly regulate Internet cafes. *Internet Sweepstakes Cafes*, AM. GAMING ASS'N, http://www.americangaming.org/government-affairs/priority-issues/internet-sweepstakes-cafes (last visited Feb. 17, 2015).

37. IMT, Inc. v. City of Lumberton, 219 N.C. App. 36, 38, 724 S.E.2d 588, 590 (2012), *rev'd*, 366 N.C. 456, 738 S.E.2d 156 (2013).

38. *Id.* at 45–47, 724 S.E.2d at 595–96.

39. *Id.* at 45, 724 S.E.2d at 595.

40. *Id.* at 46–47, 724 S.E.2d at 595–96.

41. *Id.* at 48–49, 724 S.E.2d at 597 (Hunter, J., dissenting).

42. *Id.* ("[The amounts levied on the cyber gaming establishment are] in stark contrast to the modest annual license tax imposed on any other business, such as:

The Supreme Court of North Carolina reversed the appellate court's holding and rejected the common law approach to interpreting the Just and Equitable Tax Clause.[43] The court observed that the common law cases cited by the appellate court predated the 1935 amendment to Article V[44] and that the amendment did not adopt the "unreasonable and prohibitory" language from common law.[45] According to the court, the new language—"[t]he power of taxation shall be exercised in a just and equitable manner"—possessed substantive power that had yet to be applied as an independent claim.[46]

Noting the "tension" that arises between the government's taxing authority and the constitutional limitation on unjust and inequitable taxes, the court quoted *Rockingham v. Board of Trustees of Elon College*[47] to offer guidance:

> The pervading principle to be observed by the General Assembly in the exercise of [tax] powers is equality and fair play. It is the will of the people of North Carolina, as expressed in the organic law, that justice shall prevail in tax matters, with equal rights to all and special privileges to none.[48]

The *Lumberton* court concluded that while striking a balance may be difficult in some situations, the "City's 59,900% minimum tax increase is wholly detached from the moorings of anything reasonably resembling a just and equitable tax."[49]

The court refused to articulate the actual parameters of the Just and Equitable Tax Clause, citing the 59,900% increase as "unusual facts" that "transgressed the boundaries of permissible taxation and

campgrounds and trailer parks, $12.50; bicycle dealers, $25.00; restaurants, $0.50 per customer seat with a minimum tax of $25.00; pinball machines or similar amusements, $25.00; bowling alleys, $10.00 per alley; movie theaters, $200.00 per room. Granted, the mere amount of the tax does not prove its invalidity. However, the discrepancy between the tax imposed by the Ordinance upon Cyber Gambling establishments and all other businesses, while not conclusive evidence of the inequity of the tax, makes summary judgment improper." (citation and internal quotation marks omitted)).

43. IMT, Inc. v. City of Lumberton, 366 N.C. 456, 459–60, 738 S.E.2d 156, 158 (2013).

44. *Id.* at 460, 738 S.E.2d at 158–59.

45. *Id.* at 460, 738 S.E.2d at 159.

46. *Id.* at 459–60, 738 S.E.2d at 158. The court refused to consider the language merely "precatory," explaining that "[t]he people of North Carolina placed the Just and Equitable Tax Clause in their Constitution, and we are not at liberty to selectively dismiss its relevance." *Id.* at 460, 738 S.E.2d at 158.

47. 219 N.C. 342, 13 S.E.2d 618 (1941).

48. *Lumberton*, 366 N.C. at 461, 738 S.E.2d at 159 (alteration in original) (quoting *Rockingham*, 219 N.C. 342 at 344–45, 13 S.E.2d at 620).

49. *Id.* at 462, 738 S.E.2d at 160.

constituted an abuse of the City's tax-levying discretion."[50] It did, however, point to *Nesbitt* to suggest a methodology.[51] The *Nesbitt* factors—city size, exemptions from alternate taxes, and sales volume—would not be exhaustive, the court admonished, but would provide a framework for evaluating Just and Equitable claims on a contextual basis.[52] To illustrate, the court referenced the "stark difference" between the tax levied on the cyber gaming businesses and those levied on other economic activities as weighing against the tax's validity.[53]

The most striking aspect of the holding is the court's reliance on the percentage increase to overturn the tax. Though the court offered a caveat that "any large increase in a tax, or simply a high tax, would [not] alone be enough to run afoul" of the Clause, its holding references only the percentage increase as rendering the tax impermissible.[54] Evaluating taxes solely on the basis of their relationship to past years' taxes is not a particularly coherent or principled standard, one which lower courts are already struggling to apply.[55] In contrast, a contextual approach—such as that modeled in *Nesbitt* and endorsed in *Lumberton*—does not rely solely on a bright-line comparison of yearly tax rates. The court could easily apply a comprehensive analysis that looks at other factors, such as additional tax burdens or exemptions, the relationship between the tax and income or net revenue, the profile of groups or businesses affected by the tax, the necessity or luxury of the goods or services taxed, and the

50. *Id.*

51. *Id.* The court noted that *Nesbitt* considered the "size of the city, sales volume, and exemptions from alternate taxes." *Id.* at 461, 738 S.E.2d at 159.

52. *Id.* at 462–63, 738 S.E.2d at 160.

53. *Id.* at 462, 738 S.E.2d at 160; *see also supra* note 42.

54. *Id.* at 462–63, 738 S.E.2d at 160 ("While these competing considerations might be difficult to reconcile in nuanced cases, the case at bar is hardly nuanced. Here, the City's 59,900% minimum tax increase is wholly detached from the moorings of anything reasonably resembling a just and equitable tax. If the Just and Equitable Tax Clause has any substantive force, as we hold it does, it surely renders the present tax invalid.").

55. *See* Smith v. City of Fayetteville, __ N.C. App. __, __, 743 S.E.2d 662, 665–66 (2013) ("While we acknowledge a 8,900% tax increase is not as substantial as the 59,900% increase in *IMT*, we conclude the 8,900% increase violates the Just and Equitable Tax Clause for the reasons stated in *IMT*. Specifically, the City's 8,900% 'minimum tax increase is wholly detached from the moorings of anything reasonably resembling a just and equitable tax.' Therefore, it is unconstitutional as a matter of law. Without a fully-developed record and given the Supreme Court's reluctance to further define a methodology for evaluating just and equitable taxation claims, we are unwilling to articulate a methodology similar to the methodology previously adopted by this panel in *Smith I*." (quoting *Lumberton*, 366 N.C. at 462, 738 S.E.2d at 160)).

state's interest in discouraging or incentivizing a particular practice.[56] This comprehensive approach would be more consistent with historical conceptions of fair tax policy.[57] The next Part applies these conceptions to reevaluate the *Lumberton* court's analysis and to propose a challenge to North Carolina's recent increase of the mobile and modular home sales tax.

II. UNDERSTANDING AND APPLYING "JUST AND EQUITABLE" TAX POLICY

If the Supreme Court of North Carolina indeed intends to apply the Just and Equitable Tax Clause as a "distinct and enforceable" restriction on the power of taxation,[58] the potential challenges to current laws are limited only by the imagination of North Carolina attorneys. The scope of the Clause is still undetermined, its future lines opaque. The facts of *Lumberton* may be extreme, but the cited precedent, language, and reasoning are expansive. As *Lumberton* invites courts to address substantive tax policy as matters of justice and equity, creative lawyers have a unique opportunity to forge the purview of the Clause as a limitation on the legislature's tax structures. Of course, there is no settled normatively "just" or "equitable" form of taxation. Questions of tax policy generate extensive debate because their answers ultimately rest on moral and practical considerations shaped by the contours of political ideology.

A. The Essential Principles of Equitable Tax Policy

Although the *Lumberton* court did not reference moral or ethical considerations in its opinion on the license fee tax, notions of just and equitable taxation are inextricable from political morality. Tax policy helps to shape our system of ownership and property rights; it implicates distributive justice principles as well as complex ethical issues.[59] It necessarily raises philosophical questions about the rights and responsibilities that exist in both the relationships between the government and its citizens and between the individual and the collective. How much individuals should contribute and for what

56. North Carolina may be the only state to have equity language in its constitutional tax provisions, although this paper does not assess whether other states are constitutionally obligated to analyze whether a tax is fair. Because the state supreme court advocated a contextual approach to an equity assessment, a number of factors potentially could be relevant to North Carolina tax policy.

57. *See infra* Part II.A.

58. *Lumberton*, 366 N.C. at 460, 738 S.E.2d at 158.

59. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 7–10 (2002).

purposes, which persons or what property should be exempt, and what specific post-tax inequalities are appropriate are all "morally loaded and hotly disputed questions about our obligations to one another through the fiscal operations of our common government."[60] To assess fiscal fairness is to ultimately address questions of economic and social justice.

Theories of distributive justice have generally incorporated principles colloquially known as vertical and horizontal equity to assess whether a tax is "fair."[61] This historical conception of fair tax policy, though not without criticism, is "a standard for evaluating differences in the tax treatment of different people: the principle that like-situated persons must be burdened equally and relevantly unlike persons unequally."[62] The basic "norms" of vertical and horizontal equity are thus corollaries of each other.[63] Horizontal equity addresses fair taxation for similarly situated persons; vertical equity addresses fair taxation for dissimilarly situated persons.[64] Measured on these traditional axes, a fair tax system ideally recognizes that "similarly situated taxpayers must be treated alike and that differently situated taxpayers must be treated in ways that reflect their differences."[65]

While simple in theory, both vertical and horizontal equity are complex in practice. Horizontal equity tends to be a less controversial "norm" than vertical equity,[66] but it can be difficult to apply.[67] If fairness requires that like taxpayers be taxed equally, one must identify the factors that determine like or unlike status. Historically, this analysis has considered substantive factors such as income,

60. *Id.* at 3.

61. *See* Richard J. Wood, *Supreme Court Jurisprudence of Tax Fairness*, 36 SETON HALL L. REV. 421, 424 (2006).

62. MURPHY & NAGEL, *supra* note 59, at 12–13. *See generally* Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607 (1993) (exploring whether the principles of horizontal and vertical equity contain any independent normative value useful to the tax policy debate).

63. *See* Wood, *supra* note 61, at 422.

64. *See* MURPHY & NAGEL, *supra* note 59, at 13.

65. Wood, *supra* note 61, at 424.

66. *See id.* (noting that there is little debate about whether horizontal equity is a desirable policy norm); *id.* at 428 (explaining that vertical equity is less established as a "valid component of tax fairness").

67. *Id.* at 424–25; *see also* David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 44–45 (2006) (noting the practical and tautological difficulties presented by the theory of horizontal equity).

wealth, and consumption to determine the status of the tax base.[68] Vertical equity, a more progressive system of taxation, requires wealthier citizens to contribute more than low-income citizens.[69] Fiscal policy seeks to achieve vertical equity in either proportional or progressive structures.[70] A proportional structure applies a common percentage tax on income (a "flat tax") or consumption (such as North Carolina's 3% tax on automobiles).[71] Progressive structures increase the percentage tax as income or consumption rises.[72]

These basic principles are subject to criticism, however, as they may exclude other political values essential to a thorough analysis of fiscal justice.[73] But the discourse of horizontal and vertical equity is still "an excellent way to bring out the nature and complexity of the issues of political morality that tax policy must address."[74] The following two sections assess these principles and the issues they raise, first in a reconsideration of *Lumberton* and finally in a theoretical challenge to North Carolina's recent sales tax increase on mobile and modular homes.

B. Tax Equity Principles As Applied to Lumberton

It is easy to see that the privilege license fee levied on gaming parlors in Lumberton was not strictly horizontally equitable with the fees levied on the city's other economic activities, if one accepts that "economic activities" is the appropriate status classification for gaming parlors. Beyond that, the license fee equity issue becomes

68. Wood, *supra* note 61, at 427; *see also* John A. Miller, *Rationalizing Injustice: The Supreme Court and Property Tax*, 22 HOFSTRA L. REV. 79, 126 (1993) (explaining that "the possible indices of equality may be income, consumption or wealth").

69. Leo P. Martinez, *"To Lay and Collect Taxes": The Constitutional Case for Progressive Taxation*, 18 YALE L. & POL'Y REV. 111, 116 (1999).

70. *See id.* at 116–17.

71. *See id.*; *Highway Use and Property Taxes*, N.C. DIV. OF MOTOR VEHICLES, http://www.ncdot.gov/dmv/vehicle/title/tax/ (last visited Feb. 17, 2015).

72. *See* Martinez, *supra* note 69, at 117. For example, the North Carolina income tax rate on the highest earners used to be 7.5%. *See supra* note 7. The North Carolina legislature created a mostly flat income tax in 2013, taxing wage earners at 5.8%. *See supra* note 7. This restructuring reversed a progressive vertical tax, in which the state's highest earners contributed a larger share of income, and replaced it with a proportional tax. Although the higher earners will continue to contribute more dollars in the flat tax, the reduced rate is a regressive adjustment for the North Carolina tax code.

73. *See* MURPHY & NAGEL, *supra* note 59, at 13. For example, Murphy and Nagel explain that "justice" in taxes must encompass not just revenues, but expenditures and benefits as well. *Id.* at 14–15. The authors also question the assumption that "pretax market outcomes are presumptively just." *See id.* at 15. As noted previously, there is the additional issue of whether horizontal and vertical equity principles possess any independent normative content. *See* McDaniel and Repetti, *supra* note 62, at 607.

74. MURPHY & NAGEL, *supra* note 59, at 13.

murkier. The common law approach, which the court rejected, measured tax fairness in terms of the fee's relationship to revenue[75]—a principle of vertical equity.[76] Had the court applied a similar standard, it might have compared the gaming parlors' net profits with those of other businesses subject to the annual tax. As Judge Robert C. Hunter of the appellate court noted in his dissent, though the license fee at issue was much higher than the fees levied on campgrounds, trailer parks, bicycle dealers, restaurants, pinball machines, bowling alleys, and movie theaters, the discrepancy alone would not render the tax invalid.[77] Judge Hunter's observation implicitly recognized that horizontal inequity could be mitigated by other considerations in vertical equity.

Other factors may weigh in the analysis as well. For instance, the City of Lumberton, recently ranked number one in a list of America's poorest cities,[78] was very likely trying to curb what it perceived to be socially injurious behavior.[79] The practice of imposing "sin taxes"—which discourage culturally unfavorable behavior and/or raise substantial revenue[80]—dates back to the American Revolution.[81] The more technical term, "excise tax," refers to taxes levied on some but not all products.[82] Excise taxes are thus an intentional deviation from strict horizontal equity designed to further some other social value. Moreover, if Lumberton's gaming parlor businesses were generating

75. *See supra* notes 39–46 and accompanying text.

76. *See supra* notes 69–72 and accompanying text.

77. IMT, Inc. v. City of Lumberton, 219 N.C. App. 36, 49, 724 S.E.2d 588, 597 (2012) (Hunter, J., dissenting), *rev'd*, 366 N.C. 456, 738 S.E.2d 156 (2013); *see supra* note 42 and accompanying text.

78. *See* Christine DiGangi, *The Poorest Areas in America*, CREDIT.COM (Sept. 24, 2013), http://blog.credit.com/2013/09/poorest-cities-in-america/.

79. *See, e.g.*, Editorial, *Tax 'em to Death*, NEWS & RECORD (Greensboro, N.C.), May 18, 2012, at A14 (explaining that Greensboro and other North Carolina cities were enacting heavy taxes to discourage Internet sweepstakes operators).

80. *See, e.g.*, Asha Rangappa, *The Cost of Freedom: Using the Tax Power to Limit Personal Arsenals*, 32 YALE L. & POL'Y REV. INTER ALIA 17, 19 (2013), http://ylpr.yale.edu/sites/default/files/IA/the_cost_of_freedom_32_yale_l_poly_rev_inter_alia_17_2013.pdf (noting that excise taxes are "powerful tool[s] to shape social policy"). For instance, two doctors at the Mayo Clinic have advocated implementing or increasing the tax rate on substances that contribute to poor health and social behavior. Michael J. Joyner & David O. Warner, *The Syntax of Sin Taxes: Putting It Together to Improve Physical, Social, and Fiscal Health*, 88 MAYO CLINIC PROC., 536, 536–39 (2013), *available at* http://www.mayoclinicproceedings.org/article/S0025-6196(13)00128-6/pdf.

81. *See* Brenda Yelvington, *Excise Taxes in Historical Perspective*, *in* TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 31, 32 (William F. Shughart II ed., 1997).

82. James Sadowsky, *The Economics of Sin Taxes*, RELIGION & LIBERTY, Mar.–Apr. 1994, at 1, 1.

substantial revenue, particularly from citizens whose median annual income is below $30,000,[83] then a fairness assessment might look quite different. One could argue that it is indeed "just and equitable" to impose substantial fees on businesses that reap large profits by exploiting the poor. At the very least, there would be reason to question whether the tax increase was truly "wholly detached from the moorings of anything reasonably resembling a just and equitable tax."[84] But regardless of whether the *Lumberton* court reached the correct result, the opinion's endorsement of the Just and Equitable Tax Clause as a substantive limitation offers potential redress for other dubious tax schemes.

C. Tax Equity Principles As Applied to the Mobile Home Sales Tax

Lumberton's empowerment of the Just and Equitable Tax Clause potentially provides an opportunity for poverty lawyers to challenge tax structures that unfairly burden North Carolina's lower income residents. The 2014 change to mobile and modular home sales tax law provides a timely and salient example. Prior to January 1, 2014, mobile homes were subject to a retail sales tax of 2%, with a maximum tax of $300 for a singlewide and $600 for a doublewide.[85] In the summer of 2013, as part of comprehensive changes to North Carolina tax law, the General Assembly amended section 105-164.4(a)(1) of the General Statutes to increase the sales tax on mobile homes to the general rate of 4.75%.[86] The General Assembly also amended section 105-164.4(a)(8) of the General Statutes to increase the sales tax on modular homes from 2.5% to 4.75%.[87] The legislature left intact the 3%, $1500 maximum tax on aircraft and boats as well as

83. *See* Christina DiGangi, *supra* note 78.

84. IMT, Inc. v. City of Lumberton, 366 N.C. 456, 462, 738 S.E.2d 156, 160 (2013).

85. N.C. GEN. STAT. § 105-164.4(a)(1a) (2011), *amended by* Act of July 23, 2013, ch. 316, § 3.1(a), 2013 N.C. Sess. Laws 860, 870 (codified at N.C. GEN. STAT. § 105-164.4(a)(1a) (2013)); SALES & USE TAX DIV., N.C. DEP'T OF REVENUE, LEGISLATIVE CHANGES TO SALES AND USE TAX 1 (2013), *available at* http://www.dornc.com/downloads/e505_9-13.pdf; *see also* John Murawski, *NC's New Tax Law To Increase Typical Mobile Home By More Than $2000*, NEWS & OBSERVER (Raleigh, N.C.) (Dec. 27, 2013), http://www.newsobserver.com/2013/12/27/3488433/ncs-new-tax-law-will-increase.html ("The mobile home tax now is capped at $300 for single-wides and $600 for double-wides.").

86. Act of July 23, 2013, ch. 316, § 3.1(a), 2013 N.C. Sess. Laws 860, 870 (codified at N.C. GEN. STAT. § 105-164.4(a)(1a) (2013)); Murawski, *supra* note 85; *Sales and Use Tax*, N.C. DEP'T OF REVENUE, http://www.dornc.com/taxes/sales/salesanduse.html (last visited Feb. 17, 2015).

87. § 3.1(a), 2013 N.C. Sess. Laws at 870 (codified at N.C. GEN. STAT. § 105-164.4(a)(8) (2013)).

the existing 3% tax applied to other motor vehicles.[88] North Carolina's excise tax on transfers of site-built homes likewise remains at 0.2%.[89]

For a singlewide mobile home priced at $40,600, the 2014 sales tax increases from $300 to $1,928.50; for a doublewide priced at $74,200, the bill rises from $600 to $3,524.50.[90] In *Lumberton* terms, this represents more than a 500% tax hike. Not surprisingly, the increase primarily affects lower-income North Carolinians who purchase mobile homes as their principal place of residence.[91] One Raleigh retailer who sells between twenty-four and thirty-six mobile and modular homes a year says his customers' annual incomes range from $24,000 to $72,000.[92]

The tax on a 1985 Bertram 78 yacht recently listed for sale in Wilmington for $575,000? Still $1,500.[93] The transfer tax on a $200,000 site-built home? Just $400.[94] Both the mobile home tax's percentage adjustment and the discrepancy with other property tax rates thus present a possible challenge to the new rates under the Just and Equitable Tax Clause as envisioned in *Lumberton*.

For lawmakers restructuring the state tax code, the tax hike on mobile homes is purportedly about "tax fairness and tax simplification."[95] State Representative David Lewis, a Republican from Harnett County, asserted that "[i]t's fair that the tax for the

88. N.C. GEN. STAT. § 105-164.4(a)(1b) (2013); *see also Highway Use and Property Taxes*, *supra* note 71 (noting that there is a 3% highway use tax on vehicles). Although mobile homes are sometimes purchased for recreational or investment purposes, boats and aircraft are more likely to be recreational vehicles than primary residences.

89. *See* N.C. GEN. STAT. § 105-228.30(a) ("The [excise tax rate on the conveyance of real property] is one dollar ($1.00) on each five hundred dollars ($500) or fractional part thereof of the consideration or value of the interest conveyed.").

90. Murawski, *supra* note 85.

91. *See id.*

92. *Id.* Under the new tax scheme, the sales tax on a mobile home could be up to 8% of an individual's income. The United States Census Bureau calculated North Carolina's median income at $46,334 for the years 2009–13. *State and County QuickFacts*, *North Carolina*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/37000.html (last visited Feb. 17, 2015). The federal government defined the 2013 poverty threshold for a family of four at $23,550. *2013 Poverty Guidelines*, DEP'T. OF HEALTH & HUMAN SERVS., http://aspe.hhs.gov/poverty/13poverty.cfm (last visited Feb. 17, 2015).

93. *See Sales and Use Tax*, *supra* note 86 (stating that there is a 3% maximum of $1500 tax on the retail sale of boats).

94. *See* § 105-228.30(a) ("The [excise tax rate on the conveyance of real property] is one dollar ($1.00) on each five hundred dollars ($500) or fractional part thereof of the consideration or value of the interest conveyed.").

95. Paul Woolverton, *Boost of N.C. Sales Tax Causes Sticker Shock for Potential Mobile Home Buyers*, FAYETTEVILLE OBSERVER (Jan. 4, 2014), http://www.fayobserver.com/news/local/article_60651121-ce9b-5173-96f8-2e4b7b6e4244.html.

same thing—a home's a home—be roughly the same."[96] Even if Representative Lewis is right that mobile homes are more appropriately categorized with site-built homes than with automobiles, it is not clear why lawmakers did not simply apply North Carolina's 0.2% real property transfer tax to mobile homes.[97] And if mobile and modular homes are instead correctly categorized with vehicles, aircraft, and boats, their new tax burden is anything but similar.

From a horizontal equity perspective, then, the new mobile home tax is clearly unfair. It taxes mobile homes at a proportionally higher rate than either site-built homes or vehicles, the two categories most logically similar to mobile homes. The vertical equity question is more interesting, and it reveals some of the uncertainties inherent in the traditional analysis. As a proportional consumption tax, the mobile home tax may be technically equitable: both the wealthy and the poor will pay the same sales tax rate for their mobile homes, while the indigent will continue to enjoy a tax break on yacht or jet purchases. A progressive structure of vertical equity envisions the converse because it considers the relative status of the purchasers.[98] A progressive analysis would acknowledge the elephantine reality that mobile home buyers are primarily lower-income, while boat and aircraft buyers are likely to be wealthier.[99]

Lawmakers also pursue vertical equity by reducing tax liability on necessities, such as food, where lower-income individuals spend a higher percentage of their income compared to wealthier individuals.[100] For instance, a $600 housing payment is over 30% of the monthly income for a family living at the poverty line, but only 12% of the monthly income for a household bringing in $60,000

96. *Id.*

97. *See* N.C. GEN. STAT. § 105-228.30(a) (2013). Representative Lewis argued that mobile home buyers should have a similar tax burden to buyers of site-built homes. Woolverton, *supra* note 95. Buyers of site-built homes, claimed Lewis, pay the relevant sales tax on the building materials used in constructing the home. *Id.* Thus, according to Lewis, mobile home buyers should be forced to pay an equivalent sales tax. *Id.* But this argument does not account for the fact that mobile homes must also be constructed with materials equally subject to sales tax.

98. *See supra* note 72 and accompanying text.

99. *See, e.g.*, Igor Volsky, *North Carolina Lawmakers Ram Through Plan That Would Increase Taxes on Poor People*, THINKPROGRESS (July 16, 2013), http://thinkprogress.org/economy/2013/07/16/2308621/north-carolina-lawmakers-ram-through-plan-to-tax-poor-people-more-after-just-25-minutes-of-debate/# (noting that the sales tax on mobile and modular homes primarily affects lower-income citizens); *supra* notes 69–72 and accompanying text.

100. *See* 2 WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION § 13.09[1] (3rd ed. 2010).

annually. While legislators and their constituents may disagree over what exactly constitutes a necessity or whether those items should be taxed, most individuals can appreciate that North Carolina residents must afford adequate shelter, food, and clothing. Vertical equity principles weigh in favor of decreasing the tax burden on these items, particularly in the context of lower-income housing like mobile homes.

One important prospect for the Just and Equitable Tax Clause, then, is the opportunity to redress recent tax restructuring that raises taxes on low-income citizens. While it may be that the 2013 General Assembly has decided to impose a "sin tax" on the condition of poverty in North Carolina, the disproportionate burdening of the poor runs contrary to the philosophical underpinnings of the equity axes. Regressive taxation also contradicts the Supreme Court of North Carolina's cited precedent: the requirement that " 'justice shall prevail in tax matters, with equal rights to all and special privileges to none.' "[101] Under a *Lumberton* analysis, courts could assess both the current tax's relationship to the prior tax as well as the contextual factors surrounding the new tax.[102] These factors should at least begin with the issues implicated by the traditional conceptions of horizontal and vertical equity. For the mobile and modular home sales tax, the percent increase becomes even more problematic when evaluated in light of other factors, notably its disproportionate impact on low-income North Carolinians and its dissimilarity to taxation of similar property. A court could also assess the nature of the purchase—unlike most yachts, a mobile home provides many residents in North Carolina with a basic necessity of life: a roof over the heads of their families.

III. JUDICIAL REVIEW: REPLACING DEFERENCE WITH DEBATE?

Beyond the consideration of how a court might apply the Just and Equitable Tax Clause, the weightier question is whether it *should*. Since Justice Marshall affirmed the necessity of taxation in *McCulloch v. Maryland*,[103] the United States Supreme Court has consistently emphasized three themes within tax policy: the government's power to tax; the importance of judicial deference to legislatures; and the need for an "exceedingly high threshold" to

101. IMT, Inc. v. City of Lumberton, 366 N.C. 456, 461, 738 S.E.2d 156, 159 (2013) (quoting Rockingham Cnty. v. Bd. of Trs. of Elon College, 219 N.C. 342, 344–45, 13 S.E.2d 618, 620 (1941)).

102. *Id.* at 462–63, 738 S.E.2d at 160.

103. 17 U.S. (4 Wheat.) 316, 425 (1819).

render a tax unconstitutional.[104] North Carolina has similarly given "substantial deference . . . to legislative tax classifications."[105] In refusing to articulate the parameters of the Just and Equitable Tax Clause, the *Lumberton* court cited this "nearly universal deference" to legislative tax classifications.[106]

Nevertheless, in addition to overturning the license fee, the *Lumberton* court spoke broadly of the need to "protect the public from abusive tax policies."[107] "[T]his principle is even more warranted," the court continued, "when the State has been constitutionally charged with 'the duty to tax in a just and equitable manner.' "[108] Although the court refrained from defining or limiting the Clause, it directed trial courts to apply a contextual methodology in assessing claims under the Clause.[109] By defining the Clause as a substantive limitation and inviting lower courts to apply a case-by-case analysis, the Supreme Court of North Carolina boldly introduced the question of tax fairness to the arena of judicial review. Furthermore, if the court was correct that North Carolina tax policy has a constitutional equity requirement, then the *Lumberton* decision potentially turns the tide of legislative deference in North Carolina. Considering that Van Hecke, and perhaps other legal scholars, understood the Clause as a judicial check on the legislature,[110] the court may simply be eight decades late in assuming this responsibility.

But one might still expect the court to retreat from this position as soon as possible, as it imposes the judiciary as a super-legislature on almost every form and function of taxation. Furthermore, as discussed in Part II, questions of justice and equity in tax policy are both complex and controversial.[111] Yet the broader question of the judiciary's role in fiscal policy is an important one. It suggests at least two significant considerations: the ability of the political process to achieve equitable taxation with minimal judicial review, and, to the degree that tax policy implicates moral considerations or protected liberties, the role of the court in introducing moral and political theory into public debate.

104. *See* Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 427 (2004).

105. *Lumberton*, 366 N.C. at 462, 738 S.E.2d at 159.

106. *Id.* at 462, 738 S.E.2d at 160.

107. *Id.* at 462, 738 S.E.2d at 159.

108. *Id.* (quoting Lenoir Fin. Co. v. Currie, 254 N.C. 129, 132, 118 S.E.2d 543, 545 (1961)).

109. *Id.* at 462–63, 738 S.E.2d at 160.

110. *See supra* notes 18–20 and accompanying text.

111. *See supra* Part II.

A. The Democratic Process and the Public Knowledge Gap in Tax Policy

The political process rationale for entrusting legislatures with tax matters assumes that citizens both understand tax policy and can assess its philosophical justifications.[112] But one scholar notes that empirical studies do not support this assumption, explaining 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."[113] In 2011, the Public Policy Institute of California conducted a survey that revealed California's knowledge gap on state and local finances.[114] Despite voters' belief that they had substantial knowledge of the state's revenue and spending practices, only 16% knew that K-12 education was the state's largest expenditure.[115] Just 29% correctly identified personal income tax as the state's primary source of revenue.[116] The survey found that "[o]nly [six] percent of adults and [nine] percent of likely voters are able to identify both the state's top area of spending and its top revenue source."[117]

While fiscal policy affects every American, it is painfully clear that the general population is not well educated on the topic, much less informed about how taxation relates to theories of equity. Moreover, while most individuals have an instinctive conception of fairness, fairness in tax policy is uniquely multi-faceted. A general sense of what is "fair" or "unfair" is unlikely to adequately encompass the moral, political, economic, and practical complexities that permeate tax policy.[118]

112. *See* Leo P. Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 LOY. U. CHI. L.J. 297, 298 (2009) (arguing that the "democratic process is not up to the task of dealing with tax policy"). Martinez faults the branches of government as well as the citizenry. *Id.* He explains, "The public seems largely ignorant of how taxes work. Decisions made by voters without a full appreciation of what is at stake. Existing commentary on the public's perceptions of tax systems demonstrate that the popular concept of taxation diverges significantly from reality. It is nothing short of surprising to observe the extent to which people misperceive taxes and the system of taxation." *Id.* at 312.

113. Martinez, *supra* note 104, at 418.

114. MARK BALDASSARE ET AL., PPIC STATEWIDE SURVEY: CALIFORNIANS AND THEIR GOVERNMENT 5 (Jan. 2011), *available at* http://www.ppic.org/content/pubs/survey/S_111MBS.pdf.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* Marjorie E. Kornhauser, Essay, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 AM. U. L. REV. 151, 151 (1997).

The breadth of the issue further complicates the awareness problem. Taxes structure our society at every level, and questions of what should be funded and who will pay for it delve into the most minute of conceivable public purposes.[119] Even if appropriate purposes can be agreed upon, lawmakers must consider mechanisms for collecting taxes, the base measurement (e.g., property, income, or consumption), and, of course, what categories of goods or services should be exempt from taxation.[120]

Savvy politicians handily exploit public misconceptions or prejudices about this intricate and daunting subject. As part of an effort to restrict Pre-K eligibility in 2012, Representative George Cleveland, a Republican from Jacksonville, North Carolina, objected to a reference to the number of North Carolina children living in poverty or extreme poverty.[121] He told state legislators that "[w]e have no one in the state of North Carolina living in extreme poverty."[122] According to Representative Cleveland, extreme poverty is "living on a dollar and a half a day . . . . I don't think we have anybody in North Carolina doing that."[123] Representative Cleveland not only failed to distinguish North Carolina from a developing country,[124] he ignored the reality that North Carolina's youngest children may suffer the most from their impoverished circumstances.[125]

119. *See* MURPHY & NAGEL, *supra* note 59, at 5.

120. *See id.*

121. Lynn Bonner, *Jacksonville Lawmaker Says No 'Extreme Poverty' in N.C.*, NEWS & OBSERVER (Raleigh, N.C.) (Mar. 2, 2012), http://www.newsobserver.com/2012/03/02/1897815_rep-rejects-poverty-label.html?rh=1; Chris Fitzsimon, *Shamed to Reconsider*, N.C. POLICY WATCH (Mar. 1, 2012, 3:00 P.M.), http://www.ncpolicywatch.com/2012/03/01/shamed-to-reconsider/; Saki Knafo, *George Cleveland, Republican Rep, Claims No Extreme Poverty In North Carolina As Preschool Cuts Weighed*, HUFFINGTON POST (Mar. 2, 2012), http://www.huffingtonpost.com/2012/03/02/george-cleveland-poverty-north-carolina_n_1317554.html.

122. Knafo, *supra* note 121.

123. *Id.*

124. Editorial, *Preschool Education An Investment in State's Children*, STARNEWS (Wilmington, N.C.) (Mar. 5, 2012), http://www.starnewsonline.com/article/20120305/ARTICLES/120309846?p=1&tc=pg ("Cleveland later explained that he was comparing conditions in the United States to those of people in Third World countries."). The United States Census Bureau reports that more than 17% of North Carolina residents live in poverty. *State and County QuickFacts, North Carolina*, *supra* note 92.

125. *See, e.g.*, Greg J. Duncan & Katherine Magnuson, *The Long Reach of Early Childhood Poverty*, PATHWAYS, Winter 2011, at 22, 24, *available at* http://web.stanford.edu/group/scspi/_media/pdf/pathways/winter_2011/PathwaysWinter11_Duncan.pdf (highlighting "emerging research linking poverty occurring as early as the prenatal year to adult outcomes as far as the fourth decade of life").

Defending the plan to restructure the North Carolina tax code in 2013, Republican State Senator Phil Berger wrote, "Expect liberal elitists and their media cheerleaders to wage class warfare. They will fight to protect the unfair status quo that takes the fruits of your labor and gives it to someone else."[126] Such rhetorical appeals to class warfare and "makers and takers" preclude sophisticated analysis and arguably ensconce politicians from more precise discussions of fairness.[127] What is unclear, however, is whether judicial policing of tax structures would be more effective to defeat prejudice and misconceptions.

B. The Role of the Judiciary in Exploring Economic Justice

The moral dimensions of distributive justice may have attracted more attention in the aftermath of the Great Recession, but "they have generated [a] less sophisticated discussion, from a moral point of view, than other public questions that have a moral dimension."[128] Issues of "freedom of expression, pornography, abortion, equal protection, affirmative action, the regulation of sexual conduct, religious liberty, euthanasia, and assisted suicide" tend to occupy the field of social justice.[129] Fiscal policy, however, is also a fundamentally moral issue.

It is indisputable that tax policy is interwoven with other issues more traditionally viewed as social questions. For example, in 2013, the Supreme Court permitted same-sex couples to file joint federal tax returns, striking down a key provision in the Defense of Marriage Act.[130] The decision in *United States v. Windsor* established same-sex couples as alike to heterosexual couples for purposes of federal tax benefits, signaling far-reaching changes to both social and fiscal policy.[131] Other scholars have proposed a more direct approach to

126. Phil Berger, *Guest Commentary: Our Tax System Is Broken*, DAILY HERALD (Roanoke Rapids, N.C.) (Jan. 31, 2013), http://www.rrdailyherald.com/opinion/columns/guest-commentary-our-tax-system-is-broken/article_25b88a10-6bbf-11e2-ac30-001a4bcf887a.html.

127. Paul Krugman, *Makers, Takers, Fakers*, N.Y. TIMES (Jan. 27, 2013), http://www.nytimes.com/2013/01/28/opinion/krugman-makers-takers-fakers-.html?_r=0.

128. MURPHY & NAGEL, *supra* note 59, at 3–4.

129. *Id.* at 4.

130. United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013).

131. *Id.* at 2694–96. The Obama administration and a number of federal agencies have since revised their policies to be consistent with *Windsor*. *See, e.g.*, Press Release, HHS, HHS Announces First Guidance Implementing Supreme Court's Decision on the Defense of Marriage Act (Aug. 29, 2013), *available at* http://www.hhs.gov/news/press/2013pres/08/20130829a.html (announcing that "all beneficiaries in private Medicare plans have access to equal coverage when it comes to care in a nursing home where their spouse

highlighting indigence and inequality, suggesting that the Supreme Court could consider poverty a suspect classification under Equal Protection.[132] Rising wealth disparity itself is a function of economic policy,[133] and it raises complex moral questions of how much or what kind of inequality should be permissible. Where tax policy creates, reinforces, or ignores the growing chasm between the wealthy and the poor, the resulting hardships and remedies are just as much a moral concern as any so-called social issue.

One possible factor in fiscal policy's absence from the conversation is the judiciary's traditional reluctance to involve itself in tax matters.[134] As opposed to legislative politics, where rhetoric often serves elected officials better than incisive critique, courts welcome extensive, meticulous argument.[135] Authors Liam Murphy and Thomas Nagel point out that "in defining individual rights through constitutional interpretation, [the courts have] had a large influence on the introduction of moral and political theory into those other areas of public debate."[136] The courts may likewise be instrumental in ensuring that the popular conscious both understands taxation as a moral issue and appreciates some of the complexities that drive tax policy decision. At the very least, the examination and interpretation

lives"); Press Release, IRS, IR-2013-72, Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples (Aug. 29, 2013), *available at* http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples (allowing all same-sex married couples to file a joint federal return, regardless of whether they live in a jurisdiction that recognizes same-sex marriage); Memorandum from Elaine Kaplan, Acting Dir., U.S. Office of Pers. Mgmt., to the Heads of Exec. Dep'ts & Agencies (June 28, 2013), *available at* https://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5700 (informing federal agencies that same-sex married couples could now file for federal benefits).

132. *See, e.g.*, Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 644–49, 670 (2008) (arguing that the Supreme Court has "deconstitutionalized Poverty Law" by, among other things, "circumvent[ing] . . . suspect class or classification analysis"); Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 407 (2010) (contending that poverty as a suspect classification is still an open question in Supreme Court jurisprudence).

133. *See generally* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER AND TURNED ITS BACK ON THE MIDDLE CLASS (2010) (examining political and economic decisions over the past thirty years that have shifted the American economy to favor the wealthy).

134. *See supra* notes 104–06 and accompanying text.

135. MURPHY & NAGEL, *supra* note 59, at 4.

136. *Id.*

of certain provisions through litigation allow the public to consider not just how tax policy affects one personally, but, perhaps more importantly, how it treats others.

This is not to say that judicial review of tax policy is necessarily desirable. Although the North Carolina judiciary is popularly elected, the legitimacy of the court's intrusion into the legislative arena is still a concern.[137] State residents may rightly suspect that entrusting significant decisions to many elected officials is more democratic than entrusting them to a few. Additionally, activist courts that abandon a time-honored deference risk creating a "vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[138] But as long as North Carolina has opened its courtrooms to questions of tax fairness, it is worth inquiring whether judicial review offers any cognizable benefit. Increased public education and debate on the relationship between economic policy and social justice may be one such benefit. At the very least, judicial review may encourage citizens and their lawyers to recognize tax policy as a values-based system. As with other social issues, questions of tax fairness potentially produce more substantial public debate in the courts than through the political process.

CONCLUSION

The Supreme Court of North Carolina has determined that the Just and Equitable Tax Clause operates as a substantive constitutional limitation on tax policy. The challenge for the courts will be to define the parameters of the Clause and determine which tax practices are so unfair as to be unconstitutional. But theories of economic justice rest on sophisticated moral and practical considerations. Traditional conceptions of horizontal and vertical equity provide a useful framework for highlighting the complexities implicated in questions of tax fairness. By applying these principles, North Carolina lawyers can present compelling challenges to current tax policies that disproportionately harm the poor, such as the mobile home sales tax.

The judiciary has historically been reluctant to review tax policy, and the Supreme Court of North Carolina may well decide to step

137. *See* Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 849–50 (2011).

138. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992). As one scholar notes, however, the incoherence criticism for case law applies equally to the federal Constitution, particularly in the area of Fourth Amendment law. *See* Landau, *supra* note 137, at 843–44.

back from determining matters of tax equity. However, unlike electoral politics, the courts provide a unique forum for substantial argument and analysis of economic justice. Judicial review potentially serves to emphasize and explore the relationship between taxes and political morality, engaging the public in meaningful debate about the contours of social justice.

K. DAWN MILAM[**]

** Special thanks to Jennifer Little for her thorough editing and critique, to the other editors and staff of the *North Carolina Law Review*, and to Ben and Carter Milam.