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A Democratic Perspective on Tax Law

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A DEMOCRATIC PERSPECTIVE ON TAX LAW

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Abstract: As democracies around the world have faltered, legal scholars in fields as diverse as election law, labor law, and administrative law have turned to tax law to repair and support democratic governments. Taxation offers a toolset well-equipped to address concerns raised by democratic theorists focused on the conditions that shape a democratic community and help it to flourish. Tax laws can rectify social dynamics characterized by economic inequality and can help establish and strengthen civic institutions, among many possible interventions. But legal scholars evaluating and designing tax policies generally focus on the standard normative criteria of efficiency, equity, and administrability, with little specific regard for democratic concerns. This separation from democratic theory has left tax law scholars ill-equipped to respond to calls for help from more democracy-focused fields of law. Thus, tax scholarship mostly has not engaged with the increasingly important project of strengthening democratic governance.

This Article argues that democracy should be a more central consideration in designing and evaluating tax laws in a democratic system of government, exploring a set of democracy criteria that can bolster the standard normative criteria used to evaluate tax policy. The democracy criteria considered here ask: Does a change in tax rules strengthen or undermine democratic governance? This Article draws on democratic theory to identify pressure points where taxation might shape democracy, building on work by tax scholars who have tried to integrate democratic values into the standard criteria. I make the case that democratic considerations should not be subordinated to other criteria, but rather should stand on their own. I apply the democracy criteria to wealth tax proposals, showing how a democratic perspective illuminates a contemporary debate in U.S. tax policy.

Approached in this way, a democratic perspective on tax law and policy can facilitate tax responses—in scholarly discourse and in policy prescriptions—to current challenges facing democracies around the world, answering the calls of scholars in other fields who (appropriately) view tax rules as sites of important potential interventions to shore up democracy.

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INTRODUCTION

In the United States and around the world there are signs that democracies are faltering.[1] At the same time, U.S. legal scholars working in fields that implicate basic precepts of democracy—election law, labor law, and administrative law, among other areas—have seen their attempts to confront democracy-threatening developments stymied within their own fields.[2]

Tax law can help. Daryl J. Levinson recently observed that, "[i]f the goal is equalizing the political power of disadvantaged groups and

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1. *See, e.g.*, *The World's Most, and Least, Democratic Countries in 2022*, ECONOMIST: GRAPHIC DETAIL (Feb. 1, 2023), https://www.economist.com/graphic-detail/2023/02/01/the-worlds-most-and-least-democratic-countries-in-2022 (last visited July 25, 2023) (showing the decline of democracies around the world from 2016 through 2021 and holding in 2022, through a ranking of the extent of democracy on five substantive measures: electoral process and pluralism, functioning of government, political participation, political culture, and civil liberties); WORLD JUST. PROJECT, RULE OF LAW INDEX 2022 (2022), https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2022.pdf [https://perma.cc/8N8V-8MES] (showing a decline in the rule of law globally, and explaining that rule of law indicators are foundational to effective democratic governance); DANI RODRIK, STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY 95–113 (2017) (discussing the recent "democratic recession").

2. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (limiting the government's power to regulate campaign speech by corporate entities); Cedar Point Nursery v. Hassid, 594 U.S. __, 141 S. Ct. 2063 (2021) (suggesting extreme limits on workers' abilities to organize under state labor laws under a new Takings Clause doctrine).

interests, the tax system," along with other diverse areas of law, "may be every bit as relevant as the law of democracy."[3] Other scholars have turned to the tax system for help as well: following the *Citizens United*[4] opinion, election law scholars lamented that regulating campaign finance directly appears to have failed,[5] and some have pointed to tax reform as an alternative way to rein in lopsided election spending that distorts democratic representation.[6] The labor movement has faltered,[7] but tax reforms can help to reinvigorate worker organizing.[8] Antitrust and corporate law scholars have recognized that tax policy has contributed to transformations in the economy and aggregations of corporate power,[9]

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3. Daryl J. Levinson, Foreword, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 140 (2016).

4. 558 U.S. 310 (2010).

5. *See, e.g.*, Levinson, *supra* note 3, at 123 (describing how the Supreme Court in *Citizens United* and elsewhere has limited campaign finance regulations as unconstitutional restraints on free speech); Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 186 (2017) ("Recent campaign finance jurisprudence has narrowed the universe of constitutionally permissible regulation, and that trend is likely to continue in the years ahead. At the same time, political prospects for legal reform at the federal level and in many states are bleak. In the realm of campaign finance, we appear to have entered an anti-regulatory era."); Daniel P. Tokaji, *Vote Dissociation*, 127 YALE L.J. F. 761, 763 (2018) (defining "vote dissociation" as the effect of less affluent voters having diminished political influence as "concentrated wealth translates into political power").

6. *See, e.g.*, Tokaji, *supra* note 5, at 776 (recognizing that tax law's regulation of election organizations might provide a foothold for the vote dissociation claims the author introduces as a response to political domination by economic elites); Katherine Shaw, *Reorienting Disclosure Debates in a Post-*Citizens United *World*, *in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 153, 167 n.79 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) (noting potential IRS regulation, though questioning whether such regulation might also be prohibited by *Citizens United*).

7. *See Cedar Point Nursery*, 141 S. Ct. 2063; Ruth Milkman, *Union Decline and Labor Revival in the 21st Century United States*, 95 CHI.-KENT L. REV. 273, 282–84 (2020); Press Release, U.S. Bureau of Lab. Stats., Union Member (Annual) News Release (Jan. 20, 2022), https://www.bls.gov/news.release/archives/union2_01202022.htm [https://perma.cc/5E3H-FY6C] (reporting low union membership in 2021, with just 10.3% of workers being members of unions).

8. *See* Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 586, 599–620 (2021) (suggesting a variety of tax law solutions to empower "countervailing social-movement organizations"); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 499 (2015) (proposing tax law reforms to encourage "broader and more equitable participation in organized political life"); *id.* at 502.

9. *See* Lina M. Kahn, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 750 n.204 (2017) (observing that Amazon gained an eight to ten percent price advantage which contributed to its market domination); Billy Hamilton, *What an Amazon Sales Tax Deal Looks Like*, STATE TAX NOTES (Tax Analysts, Falls Church, Va.), Sept. 3, 2012, at 675 (on file with author) (exploring Amazon's business strategy to exploit gaps in states' jurisdiction to impose and collect sales tax); Matt Richtel & Verne G. Kopytoff, *Amazon Takes On California*, N.Y. TIMES (July 13, 2011), https://www.nytimes.com/2011/07/14/technology/amazon-takes-sales-tax-war-to-california.html (last visited Sept. 9, 2023) (similar).

and the tax system can help to reset the power dynamics.[10] The administrative state is under attack,[11] and administrative law scholars see possibilities to reshape social institutions through tax rules to prompt more democratic engagement and responsiveness.[12] In short, in the face of urgent challenges to some of the foundations of modern democratic governance, a disparate and perhaps unlikely set of eyes are turning to tax law and policy as a useful tool and source of solutions.

This Article starts from the propositions that tax law should be able to respond to these calls and that tax law can be a nexus for useful interventions that bear directly on the future of democracy. The U.S. tax system offers a few distinct advantages in this endeavor. Tax law is a singular area of law in the United States focused on economic difference, which is important given that economic inequality is broadly seen as a source of democratic decline.[13] Further, tax law has traditionally been almost entirely the result of democratic decision-making, rather than subject to court-imposed constitutional constraints.[14] Unlike other areas of law where constitutional jurisprudence has thwarted moves toward more democratic and popular legislation, tax laws are well within the mandate of policymakers.[15] Viewed within this context, the moment seems ripe for tax law to help to repair and shift the course of democracy in the United States and beyond.

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10. *See* Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1218 (2004) (exploring the historic justification for the corporate tax as a way to regulate the power of corporate managers).

11. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. __, 142 S. Ct. 661 (2022) (per curium) (striking down a rule requiring certain employers to have their employees receive a COVID-19 vaccination or wear a mask); West Virginia v. EPA, 597 U.S. __, 142 S. Ct. 2587 (2022) (striking down the Clean Power Plan as invoking a "major question" that exceeded the EPA's authority under the Clean Air Act because Congress did not specify the policy that the EPA adopted).

12. *See* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 88 (2017) (proposing more robust forms of engagement with administrative decision-making and suggesting that one answer is to develop "institutions that expand the capacities of citizens to contest and reshape" existing power bases, and also indicating it is necessary to reshape the economic system to accomplish this).

13. *See* Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy*, 83 OHIO ST. L.J. 471, 498–507 (2022) (detailing tax literature that shows economic difference as an accepted distinction for tax law purposes, in contrast to other areas of law where economic considerations have been "encased" from legal intervention by Supreme Court doctrine, using the terminology of recent "law and political economy" critiques); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1–4 (2012); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 1–32 (2d ed. 2016); *infra* notes 80–87, 100–101 and accompanying text.

14. *See infra* notes 39–43 and accompanying text.

15. Of course, some of the democracy-thwarting moves in other areas of law may raise challenges for legislative action as well. For example, gerrymandered and polarized legislatures may be resistant to enacting statutes that have broad support from the general public, because that support may not be reflected in voters that have actually elected representatives in each district.

Unfortunately, using tax laws to strengthen democracy involves a set of considerations for which tax scholars and policymakers have long had a significant blind spot. Although the traditional modes of tax policy analysis—efficiency, equity, and administrability[16]—allow for some consideration of democratic values,[17] these traditional lenses on tax law also allow scholars and policymakers to ignore the democratic context and effects. Particularly among tax scholars in the United States,[18] the connections between taxation and democracy have often been treated ad hoc, and this Article makes the case that those connections remain underappreciated.[19] Scholarship and commentary explicitly confronting tax and democracy have frequently been descriptive rather than normative and do not consider normative aspects of tax as helping to produce the democratic state.[20] When normative, scholarship on taxation and

16. Allison Christians, Introduction to Tax Policy Theory 9–23 (May 29, 2018) (unpublished manuscript), https://ssrn.com/abstract=3186791 (last visited Aug. 22, 2023) (describing the normative foundations of tax policy as equity, efficiency, and administrative capacity); *see also* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 817–69 (R.H. Campbell, A.S. Skinner & W.B. Todd eds., Liberty Classics 1981) (1776) (discussing four principles of taxation: fairness, certainty, convenience, and efficiency); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568, 594–97 (1965) (proposing that the "harmony" between tax and the "Political Order" should be an additional criterion for evaluating tax proposals, although they do this without reference to democratic commitments or values).

17. *See infra* Part I.

18. The focus of this paper is on tax law and policy and tax scholarship in the United States, primarily at the federal level (though with some attention paid to state and local tax issues). While this discussion has implications for taxation and democracy in other countries and for international taxation (i.e., the coordination or lack thereof of policies between and across countries), I reserve further consideration of those issues for another time and place. *See generally* Wolfgang Schön, *Taxation and Democracy*, 72 TAX L. REV. 235, 244–62 (2019) (discussing pressures on democratic tax policies resulting from international tax competition and mobility of people and capital); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1625–31 (2000) (discussing the implications on democratic governance of various equity and efficiency arguments in international taxation). Nonetheless, the discussion is intended to be exportable beyond the context of U.S. federal tax policy, and the challenges introduced here have relevance for considering taxation across and within different nation-states.

19. There are some exceptions, discussed further *infra* Part I. *See, e.g.*, Clinton G. Wallace, *Tax Policy and Our Democracy*, 118 MICH. L. REV. 1233, 1238 n.31 (2020) (observing that standard evaluative frameworks for tax law do not facilitate a democracy-oriented analysis).

20. *See generally* ISAAC WILLIAM MARTIN, THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS (2008); EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY (2019); THOMAS BYRNE EDSALL WITH MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992); JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987); EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 12 (2d ed. 1921) ("[W]ith the growth of democracy in more recent times a system of taxation which inevitably results in undue burdens on the less fortunate members of society [i.e., a consumption tax] was destined to become unpopular and

democracy has often focused on how democratic decision-making institutions can be navigated or circumvented to achieve desired tax policy results.[21]

This Article introduces a framework for democratic perspectives on taxation. Drawing from the work of democratic theorists, I suggest a set of democracy criteria for evaluating taxation. The democracy criteria ask: *Does a change in tax rules strengthen or undermine democratic governance? What tax laws or policies best encourage and promote thriving democratic practices?* The set of considerations proposed here provides a way to approach tax laws and policies, as well as tax scholarship, from a more consciously democratic perspective. Using the democracy criteria outlined here can make democracy a more central consideration in the evaluation of tax laws and policies. Furthermore, it can spur tax scholars and the tax system to address the urgent calls for help from other fields of law.

Specifically, this Article identifies pressure points whereby taxation might enhance democracy. First, tax law can be used to promote faith in democracy—that is, tax affects how community members feel about their governing institutions.[22] As elaborated in Part II, tax laws can serve a "communicative" function by expressing shared values among members of the democratic community that can reinforce collective decision-making.[23] Further, competent government can strengthen community members' faith in their democracy.[24] The interactions connected with complying with tax obligations provide a rich interface between a government and its citizens in which the government can exhibit competence or lack thereof.

Second, tax law can help enhance citizens' capacities and opportunities to participate in democratic decision-making.[25] Paying taxes can provide community members with voice in the form of personal control over their government—"voting" with their taxes in various ways discussed

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to pass away."); *see also id.* at 660, 672; *id.* at 45–46 (noting a tendency for democracies dating back to Italian towns in the Middle Ages to prefer income taxation over other forms of taxation).

21. *See generally* Clinton G. Wallace, *Democracy Avoidance in Tax Lawmaking*, 25 FLA. TAX REV. 272 (2021) [hereinafter Wallace, *Democracy Avoidance*] (discussing some strands of tax scholarship that have been explicitly or implicitly critical of democratic decision-making structures). For a discussion of literature that has analyzed how democratic decision-making has affected tax policy, see *infra* notes 127–129 and accompanying text.

22. *See infra* section II.A.

23. SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW 18–19 (Hannah Ginsborg ed., 2021) (introducing a theory of "communicative value" of law generally not focused on tax laws specifically); *see infra* section II.A.1.

24. *See infra* section II.A.2.

25. *See infra* section II.B.1.

below.[26] Additionally, tax revenue and the structure of tax rules can foster and support democratic capacity through investments in education and development (human capital) that enable people to be effective participants in democratic decision-making.[27]

A third way in which tax has the potential to affect democratic governance is that tax law can be used to manage and shape the economy with an eye toward establishing a society that empowers its citizens and facilitates stable and inclusive economic conditions.[28] Importantly, and as scholars have widely appreciated, economic inequality is a threat to stable democratic governance, and tax law's central role in redistribution thus makes it a site of contests that are relevant to democratic vibrancy.[29] This Article advances this discussion by recasting two leading concerns in standard tax analysis, distribution and allocation,[30] in democratic terms.[31] A concern for democracy-threatening maldistribution is elaborated through the democratic theory lens of non-domination, which goes beyond economic fairness to consider influence in democratic decision-making and harms inflicted on others.[32] Concerns for misallocation—spending resources on the wrong things—are explored through the democracy-focused lens of managing the economy for stability and inclusivity so that gains are widely shared and so that economic growth contributes to democratic vibrancy.

This Article makes the case that these democracy criteria (and, potentially, other aspects of how tax law affects democracy) should join efficiency, equity, and administrability as normative frameworks for evaluating the design of any tax system or tax policy change. These kinds of democratic considerations will help to eliminate the blind spots in more traditional tax policy analysis. As with efficiency, equity, and administrability, there is plenty of room for debate about priorities and goals within the democracy criteria for taxation.

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26. *See infra* section II.B.1.

27. *See infra* section II.B.2.

28. *See infra* sections II.B.2–II.C.

29. *See, e.g.*, KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH (2002) (arguing that the United States has become a plutocracy due to a massive concentration of wealth); RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 4–5 (5th ed. 1989) (noting that fiscal policy "must be determined through the political process"); *see also* GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 254–57 (2017) (discussing concerns about inequality and extreme wealth as a threat to democracy).

30. *See* MUSGRAVE & MUSGRAVE, *supra* note 29, at 6–11.

31. This discussion builds on the important work of tax scholars on democratic undertones in tax equity analysis. *See infra* note 37 and accompanying text.

32. *See infra* section II.C.1.

In advancing this democratic perspective on tax, this Article also reviews how the democracy criteria map onto various different types of democracy.[33] It then considers an example of a recently heated tax policy debate that might be more explicitly informed by a democratic perspective: wealth taxes.[34] Taxes on wealth have received significant attention recently as a potential source of revenue and have been justified rhetorically in public debates as a tool to shape and support democratic governance. Applying the democracy criteria in this tax policy debate illustrates that existing scholarship has not fully appreciated the import of democratic perspectives in analyzing proposed tax laws.[35]

The Article proceeds as follows. Part I evaluates the democratic blind spots in the standard normative criteria used to evaluate tax laws and policies and highlights the limited tax scholarship that has focused on links between tax and democracy. Part II introduces a set of democracy criteria that can help to center democratic considerations in tax discourse, linking tax theory directly with democratic theory. Part III takes the democratic perspective on taxation for a test run, applying it to the recent debates on wealth taxes. The final Part concludes.

I. DEMOCRATIC BLIND SPOTS IN CONVENTIONAL TAX ANALYSIS

Efficiency, equity, and administrability are the standard normative criteria for evaluating tax law and policy.[36] Scholars working with these standard criteria have sporadically confronted the implications of tax rules for democracy,[37] and it is the case that each of the traditional criteria can

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33. *See infra* section III.A.

34. *See infra* section III.B.

35. *See infra* section III.B.

36. *See supra* note 16 and accompanying text.

37. There is, to be sure, some significant and important work in this area. *See, e.g.*, Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1441 (2018) (introducing a theory of relative economic power as a justification for tax policy proposals to reduce economic inequality); Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1922–29 (2020) (evaluating democratic responsiveness in connection with local property tax laws and limitations); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 840–49 (2001) [hereinafter Repetti, *Democracy, Taxes, and Wealth*] (summarizing research on concentrations of wealth and democratic effectiveness); James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV 1129, 1131–32 (2008) [hereinafter Repetti, *Democracy and Opportunity*] (introducing "equal opportunit[y] for all citizens to achieve self-realization" as a principle of equity that should animate tax policy); AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, at 346 (2013) ("[P]aying taxes directly to the federal government gave citizens a greater stake in how public funds were raised and used, and that direct taxation ultimately helped forge a renewed sense of civic identity."); JEREMY

be shaped to allow for some consideration of democratic values. However, each set of criteria has usually allowed tax policymakers and scholars to ignore or even to take a skeptical position towards centering democratic considerations in evaluating tax laws and policies.[38]

This is particularly important in the United States, where tax laws are subject to few, if any, democratically oriented constraints. Indeed, Wolfgang Schön's important comparative work on taxation and democracy identifies the United States as a "consent" jurisdiction, in which democratic processes shape the tax system.[39] That makes tax rules in the United States distinct from "content-based" jurisdictions in which constitutional standards, often imposed by the courts, ensure equitable taxation and constrain tax laws in other ways.[40] Thus, in the United States, tax policy is primarily a product of statutes enacted through regular democratic processes, in contrast to constitutionalized and democratically focused areas of law, such as freedom of speech, equal protection, or searches and seizures.[41] Without these sort of constraints, tax

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BEARER-FRIEND, RESTORING DEMOCRACY THROUGH TAX POLICY (2018), https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI_Restoring-Democracy-Through-Tax-Policy_201812.pdf [https://perma.cc/NA3P-FSDY] (proposing several ways that tax policy can be used to strengthen democracy in the United States); Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 547–48 (2002) (arguing that accountability and oversight are lacking in direct democratic decision-making on fiscal policy as compared to representative democratic governance); Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 416–17 (2003) (parsing possible democratic commitments to political equality versus equality in tax burdens); Philip T. Hackney, *Political Justice and Tax Policy: The Social Welfare Organization Case*, 8 TEX. A&M L. REV. 271 (2021) (proposing political justice as an evaluative framework for substantive tax policy); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996) (critiquing examples of racial subordination perpetrated through the federal tax code); Avi-Yonah, *supra* note 10, at 1238–41 (considering democratic implications of corporate taxation). *See generally* CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

38. *See infra* sections I.A–I.C; *see also* Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 989 (1997) (noting the deficiency in tax scholarship that it seldom addresses democratic values).

39. Schön, *supra* note 18, at 244–62.

40. *Id.*

41. *See* Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 547 (1983) (upholding the statutory restriction on lobbying activities by 501(c)(3) organizations and explaining that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes"). The U.S. Constitution addresses taxation in four primary respects. First, it grants Congress broad power to tax. U.S. CONST. art. I, § 8, cl. 1. Second, it limits the manner in which Congress can impose "direct" taxes on individuals, requiring that those taxes must be apportioned by reference to the population of each state. *Id.* art. I, § 9, cl. 4. Third, the Sixteenth Amendment allows for direct taxation of "incomes, from whatever source derived." *Id.* amend. XVI. And, finally, the Twenty-fourth Amendment disallows states from imposing poll taxes, which might prevent exercise of the right to vote. *Id.* amend. XXIV. Congress's taxing power has been interpreted to be expansive.

policymakers look to normative tax policy analysis to design tax laws and rules that shape the U.S. tax system.[42] Similarly, there are few limits on the taxing power of states and local governments.[43]

Because the frames of analysis that tax scholars and policy analysts deploy to analyze tax legislation and regulations are the primary constraints on tax policy development, integrating democratic values into the normative analysis of taxation is particularly important in the United States as a way to inject democracy into tax policy. Nonetheless, as this Part explores, the three standard criteria have been cast by some scholars and critics in ways that conflict with the demands of democratic governance.[44] Even in an area of tax law as patently connected to democratic processes as the regulation of lobbying and campaign expenditures of charitable organizations and businesses, analysis has been hemmed in by the limitations of the standard criteria: equity, efficiency, and administrability.[45] As Professor Miriam Galston observed, the tax code's regulation of lobbying expenditures "ha[s] been the subject of much commentary and controversy, [but] these discussions ordinarily evaluate the lobbying rules solely in terms of tax policy concerns."[46]

Although there are some debates at the margins, the power to tax income is viewed as giving Congress broad authority to tax anything that it determines to be income or a proxy for income, without limit. *See* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 723–36 (2020).

42. The Supreme Court has repeatedly insisted that it will defer to Congress and to state legislatures on tax design, and Congress has broad discretion to design all variety of taxes. *E.g.*, Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 570–73 (2012) (explaining that the power to tax is broader than the commerce power, and that there are few limits on what constitutes indirect taxation); *Regan*, 461 U.S. at 547; Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (noting that courts undertaking equal protection review should be "especially deferential in the context of classifications made by complex tax laws").

43. At the state and local levels there are examples of constitutional limitations introduced over the last fifty years or so. *See, e.g.*, CAL. CONST. art. XIII (establishing property tax limitations through Proposition 13 in 1978); TEX. CONST. art. VIII, § 24-a (prohibiting state income taxation of individuals, as established by Proposition 4 in 2019).

44. For example, political scientist John Witte's work entailed combining tax policy and political theory; Witte identified that, in contrast, "[m]ost writing on taxes takes the form of relatively standard policy analysis . . . judged against a string of values, such as horizontal and vertical equity, market distortion, and administrative efficiency." JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX, at xvii (1985).

45. *See supra* note 16 and accompanying text.

46. Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1272–73 (1993). Galston continued:

> [s]uch discussions are extremely useful. Nonetheless, they are inevitably partial because they fail to consider the insights of other disciplines into the nature and operation of the legislative process. This omission is unfortunate because tax policy does not operate in a vacuum. Rather, it incorporates, often unreflectively, theoretical assumptions about the nature of individuals, society, and politics.

Id. at 1273.

The democracy criteria, as introduced in Part II, would help to elevate democratic considerations so as to eliminate the blind spots outlined in sections I.A, I.B, and I.C.

A. Efficiency Without Governing Context

Tax economics literature generally fails to account for a democratic governing context—i.e., the political structure in which tax laws apply. For example, the United States is described by some democratic theorists as a *pluralist democracy*,[47] a large, diverse society that is governed through various power centers that feature democratic control to varying degrees and through a variety of mechanisms.[48] Economic analysis of efficiency typically proceeds by establishing a revenue "target"—how much money the government requires—and then seeks the least distortive policies to raise that amount of revenue.[49] The potential uses of revenue do not play into the analysis, nor does consideration of the process by which tax rules are determined.[50] Economists want to isolate and control other variables to focus on efficiency.

Still, to zero in on efficiency analysis, economists must make assumptions about certain political inputs. Some economists have treated the results of the actual political process as an accurate representation of the preferences of the population.[51] Others have described existing laws as a proxy for the real preferences of the population.[52] Frequently, scholars considering tax law from an economic perspective have approached

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47. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989).

48. *See infra* section III.A (elaborating on polyarchy as well as other models of democracy that might constitute the governing context or the democratic ideal that tax policy can help move toward).

49. *See* Joseph E. Stiglitz, *Pareto Efficient and Optimal Taxation and the New New Welfare Economics*, *in* 2 HANDBOOK OF PUBLIC ECONOMICS 992 (Alan J. Auerbach & Martin Feldstein eds., 1987).

50. *See generally* EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY (2015) (critiquing the myopic focus of tax analysis on revenue raised and not on revenue spent); Wallace, *Democracy Avoidance*, *supra* note 21, at 290–315 (critiquing undemocratic features of the U.S. federal tax lawmaking process).

51. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 659 (2004) (dismissing the concern that because "the income tax is set by an imperfect political process," the policies may not reflect actual preferences of the population); SUSAN B. HANSEN, THE POLITICS OF TAXATION: REVENUE WITHOUT REPRESENTATION 6 (1983) (commenting, as a political scientist, that "economists' accounts of the policy-making process often appear politically naïve or superficial to political scientists and probably to practicing politicians as well").

52. *See* HANSEN, *supra* note 51, at 36 (describing and critiquing Anthony Downs' median voter theorem as failing to account for some complexities of political institutions and processes); David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749, 798–99 (2010) (critiquing the assumption that law reflects the preferences of the "median voter," because that assumption fails to appreciate the realities that shape legislative enactments, including time constraints and veto points that may cause majority preferences *not* to be reflected in the law).

economic analysis as independent of any democratic considerations.[53] As Professor Zachary Liscow explained, political economy considerations on the whole are "typically absent in economic analysis."[54]

Ignoring political context or disregarding the connections between democracy and efficiency can be problematic. For example, the Tax Foundation, a leading (generally conservative) think tank focused on tax policy, recently offered an efficiency-based critique of state level proposals to tax high-end corporate and individual income.[55] The proposals were explicitly motivated by concerns related to political economy and gathering concentrations of economic and political power, but the Tax Foundation, by failing to go beyond traditional efficiency analysis, missed these considerations of political context.[56] Professors Joseph Bankman and Daniel Shaviro—each committed to welfare economics as an analytical framework for their own work—observed that "[t]he literature's frequent use of simplified, psychologically naïve models . . . may have contributed to under-appreciating the full consequences of rising high-end wealth concentration."[57] This under-appreciation included, in their eyes, the "adverse political economy effects" that Thomas Piketty lamented in his examination of wealth inequality.[58]

In accepting efficiency as a pillar of tax policy analysis, but not thinking more critically about when and what kind of efficiency is

53. *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1704 (2018); *see, e.g.*, Torsten Persson & Guido Tabellini, *Political Economics and Public Finance*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1549, 1553 (Alan J. Auerbach & Martin Feldstein eds., 2002) (remarking on the oddity of different fiscal policies emerging from different political systems).

54. Liscow, *supra* note 53, at 1704.

55. Jared Walczak, *New York, Oregon, and Other States Eye Much Higher Taxes on High Earners*, TAX FOUND. (Feb. 15, 2023), https://taxfoundation.org/blog/state-capital-gains-tax-estate-tax-proposals/ [https://perma.cc/6X82-3AGZ] [hereinafter Walczak, *Higher Taxes*] ("[D]espite robust revenues, some lawmakers are champing at the bit to raise taxes on higher-income households."); Jared Walczak, *Wealth Tax Proposals Are Back as States Take Aim at Investment*, TAX FOUND. (Jan. 17, 2023), https://taxfoundation.org/blog/state-wealth-tax-proposals/ [https://perma.cc/MDZ4-FYF7] [hereinafter Walczak, *Wealth Tax Proposals*] (describing wealth tax proposals as a product of "economic illogic").

56. *See* Walczak, *Higher Taxes*, *supra* note 55; Walczak, *Wealth Tax Proposals*, *supra* note 55; Lauren Aratani, *Tax the Rich, Urge Protesters at New York City's 'Towers of Power*,*'* GUARDIAN (Jan. 19, 2023, 4:30 PM), https://www.theguardian.com/us-news/2023/jan/19/new-york-taxes-super-wealthy-protest-towers-of-power [https://perma.cc/GSZ2-XYZ3] (describing a coordinated legislative effort to advance wealth taxes across different states as motivated in part by concern that "[d]efending democracy and building cooperation requires action to build fairer economies" (quoting a letter released publicly by "205 members of the global super-rich" in support of the effort)).

57. Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453, 455 (2015).

58. *Id.*; *see also* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

desirable within the context of democratic governance, the tax economics literature treats market outcomes as "natural, obviously desirable, [and] self-evidently the sort of thing the Constitution protects."[59] The basic economics-based argument that taxes should minimize distortions gives moral and political weight to market outcomes.[60] But as Professors Liam Murphy and Thomas Nagel have pointed out, this elevation of market outcomes is not well justified.[61] The reality that markets are a product of government policies, and that markets might produce different outcomes at the direction of different types of government, is often missing from the tax economics literature.[62]

Some economists defend the predominate approaches to political considerations in economic analyses of tax. Some argue that the effects of a tax that are detrimental to democratic governance may be incorporated into economic models as negative externalities, with a price attached.[63] Others argue that concerns such as governing context and considerations related to the (democratic) political process are best viewed as potential elements of equity.[64] By this view, democratic considerations fit into equity[65]—along with a host of other unquantifiable welfare considerations.[66]

But these approaches do not work to give democracy sufficient attention. In optimal tax analysis, for example, a social welfare function can include any variety of considerations including, potentially,

59. Jedediah Britton-Purdy & David Singh Grewal, *Law & Neoliberalism*, LPE PROJECT (Nov. 6, 2017), https://lpeblog.org/2017/11/06/law-neoliberalism/#more-161 [https://perma.cc/EV4F-35DZ]. The authors noted that this genre of neoliberal arguments then "abstract away from considerations of distribution and attention to competing values, especially democratic ones." *Id.*

60. David Singh Grewal & Jedediah Purdy, Introduction, *Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 6 (2014) (referring to this kind of reasoning as relying on an unjustified "market fundamentalism").

61. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 34–36 (2002).

62. *Id.*; *see also* Bearer-Friend et al., *supra* note 13, at 501–03, 509–10.

63. *See* David Hasen, *Accretion-Based Progressive Wealth Taxation*, 20 FLA. TAX REV. 277, 293–302 (2017) (discussing various negative externalities imposed on the American political system resulting from extreme concentrations of wealth); *cf.* Glogower, *supra* note 37, at 1444 (observing that one of the justifications for a wealth tax in the welfare economics literature is the consideration that concentrations of wealth may generate negative externalities).

64. *See* Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1949 (1987) (describing economists as potentially integrating democratic concerns into a general measure of wellbeing).

65. *See* Bearer-Friend et al., *supra* note 13, at 510–14.

66. *See generally* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 403 (2002) (contending that the social welfare function includes anything and everything that "has value to members of society").

preferences for strong democratic governing institutions and norms.[67] However, as Professors Bankman and Thomas Griffith explained, although "individual liberty and democracy" may positively affect individual welfare and therefore can be incorporated into the social welfare function, often "they are not accorded independent value."[68] The result is that these considerations are not meaningful to this economic version of tax analysis, even if nominally included.[69]

A recent paper by Professor Liscow recommends that law and economics scholars should give greater consideration to the governing context in which their policy prescriptions are meant to be implemented.[70] Liscow responded to the influential argument advanced by Professors Louis Kaplow and Steven Shavell that distributional effects should be disregarded in the formulation of legal rules and that all redistribution should be accomplished through the tax and transfer system.[71] Liscow identified this idealized divide as ultimately resulting in inadequate redistribution, because taxes and transfers are not, in the real world, matched to corresponding legal rules that result in undesirable distributional consequences, and because the tax and transfer system, in some instances, cannot provide adequately targeted redistribution to compensate for certain rules.[72] This disconnect—a discipline committed to policy prescriptions that may well be impossible to achieve in a democratic decision-making system—results in incomplete and bad policies.[73] It also may contribute to disillusionment among the populace.[74] If narrow economic analysis drives tax policy, without any balancing against or accounting for democratic values, it is a formula for tax rules that fails to adequately support democracy.

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67. *See* KAPLOW & SHAVELL, *supra* note 66, at 403 ("Everything that is thought to be socially relevant because it has value to members of society is included in the measure of social welfare."); Bearer-Friend et al., *supra* note 13, at 513.

68. Bankman & Griffith, *supra* note 64, at 1949.

69. *Id.*

70. Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495 (2022) (arguing that some legal rules are preferable to transfers as vehicles for redistribution because of the particular contexts in which those legal rules operate).

71. KAPLOW & SHAVELL, *supra* note 66; *see also* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1491–92 (2018) (responding to Kaplow and Shavell and urging consideration of distributional effects in regulations).

72. Liscow, *supra* note 70, at 529–30.

73. *Id.*

74. *See* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 201 (2015) (arguing that law and economics and related "neoliberal" frames of policy and legal analysis "imperil[] the ideal, imaginary, and political project of democracy" by, for example, "dismantl[ing] social infrastructure" and "destroy[ing] social solidarities").

B. Equity Without Collective Power

Even as some economists view equity as the lens for consideration of all variety of nonquantifiable values in tax analysis, including democracy,[75] in tax law scholarship and in public debates about tax policy, equity has consistently taken on a narrow meaning.[76] Optimal tax models generally incorporate equity as a product of wage rate, which indicates "ability to pay" and is seen as the appropriate basis for redistribution.[77] This makes equity a question of interpersonal fairness—i.e., how does the taxation of person X compare to the taxation of person Y?[78] This approach to equity, however, does not confront issues of collective power and how tax rules might affect ability to govern and engage with democratic political institutions. Thus, standard equity analysis covers important considerations, but it can do so at the exclusion of democratic considerations. With this blind spot, equity analysis can bless a given distributional outcome without considering how the tax rules might affect democratic engagement and *who* has an opportunity to affect government decision-making.

Consider poll taxes. Prior to the 1960s, poll taxes in many southern states effectively prevented poor Black Americans from voting.[79] Viewed through a traditional limited equity lens, the tax could be seen to impose monetary costs that mostly fell on higher income people—people who could afford to pay the poll tax were the ones who bore the financial burden of the tax. That narrow view might make the poll tax appear to be distributionally progressive. One might further argue, applying a simple version of equity analysis, that poll taxes achieve progressivity at very little efficiency cost, given that the value of any single vote is very low. That is, a deterred vote has very little value to the individual who might

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75. *See supra* notes 64–66 and accompanying text.

76. *See* Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 656–59 (2016) (describing traditional notions of "economic fairness" which she critiques as insufficiently attentive to some democratic values).

77. *See* Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 CORNELL L. REV. 523, 562–64 (2013).

78. *See* Stanley S. Surrey, *Federal Tax Policy in the 1960's*, 15 BUFF. L. REV. 477, 488–89 (1966) (describing horizontal equity, in this traditional formula, as the idea that similarly situated taxpayers should face similar tax burdens).

79. The term "poll tax" generally refers to a flat tax levied on individuals. *See* ROBIN EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 263 (2006) ("Levied at a flat sum regardless of wealth or income, a poll tax is often considered the paradigmatically regressive tax."). The discussion here, however, refers to the twentieth-century American version of poll taxes, which were imposed at polling places as barriers to voting. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (striking down poll taxes as unconstitutional). Poll taxes are discussed further *infra* notes 228–230 and accompanying text.

have voted if not for the poll tax. Of course, this analysis of poll taxes disregards the important political reality that these taxes effectively diminished the collective power of Black citizens, alienating them from their own government because their lack of vote meant that their preferred candidates did not win. In contrast, poor whites might have believed their political interests were, in some respects at least, advanced by the many whites who were able to pay and vote.[80] Various aspects of collective power—relevant to vibrant democracy, but not necessarily reflected in typical equity analysis—are explored further in Part II.

The earliest income tax laws in the nineteenth and early twentieth centuries were motivated by these sorts of collective power concerns. The democratic effects of concentrated economic power shaped the early design of the federal tax system.[81] In the years leading up to the enactment of the 1894 income tax, President Grover Cleveland advocated for tax reform, focusing particularly on reducing tariffs that protected manufacturing interests but raised prices for consumers, to combat "the communism of combined wealth and capital."[82] The corporate income tax was then motivated by concerns about aggregations of wealth that created political power bases.[83] And the link between progressive taxation and the concerns with concentrated wealth and resulting power dynamics dated back even earlier.[84] Concerns with concentrated economic power subsequently motivated the ratification of the Sixteenth Amendment—granting Congress the unambiguous power to tax income—as well as the 1913 income tax statute that introduced the modern income tax.[85] Later, President Franklin D. Roosevelt assailed income inequality, comparing

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80. *See* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 76–77 (stating that in the early 1940s, poll taxes "disenfranchised three whites for every two [B]lack voters"); *see also* Robin Einhorn, *Tax Aversion and the Legacy of Slavery*, TAX NOTES (Tax Analysts, Falls Church, Va.), June 12, 2006, at 1277, 1278–79 (on file with author) (explaining the revolutionary roots of these attitudes, with slaveholding power-holders convincing nonslaveholding white majorities to support their agenda).

81. *See* STEVEN R. WEISMAN, THE GREAT TAX WARS: LINCOLN—TEDDY ROOSEVELT—WILSON, HOW THE INCOME TAX TRANSFORMED AMERICA 4 (2004).

82. *Id.* at 112; *see also* Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW. 295, 297–98, 318 (2013).

83. Avi-Yonah, *supra* note 10, at 1215–25.

84. *See* EDWIN R.A. SELIGMAN, PROGRESSIVE TAXATION IN THEORY AND PRACTICE 134–35, 192–94 (2d ed., Am. Econ. Assoc. 1908) (1894) (describing work by Florentine historian Guicciardini in the fifteenth century advocating progressive taxation to reduce wealth concentrations and similar arguments by Rousseau in the eighteenth century).

85. *See* THE AMERICAN WAY IN TAXATION: INTERNAL REVENUE, 1862–1963, at 22, 25 (Lillian Doris ed., 1963).

the top 1.5% to the bottom 47%.[86] President Roosevelt most famously called for reconfiguring power dynamics through antitrust enforcement; Roosevelt also called for greater redistribution through the tax system.[87] Power dynamics were an important and consistent consideration in earlier eras of federal tax policy.

As compared to the other standard criteria, the normative concept of equity has been relatively fertile ground for some democratic considerations, and this is where democratic values have most often been invoked in tax scholarship. Professor Phil Hackney introduced a variation of equity, describing "equity in a governance sense" (rather than in an "economic sense") as a means to consider democratic values in tax policy analysis.[88] Professors James R. Repetti and Linda Sugin have each offered robust versions of democratically-oriented equity analysis.[89] Sugin proposed a more "procedural" approach described as "democratic fairness," and distinguishes it from the standard equity concerns oriented around economic fairness.[90] This democratic version of fairness "encompasses democratic values that are not reducible to dollars."[91] Repetti proposed a democratic opportunity prong of equity analysis.[92] In this approach, taxation affects democratic citizenship through equality among individuals—specifically through political equality and equality of opportunity.[93] These are important democratic values that fit nicely into traditional tax equity analysis. Still, fitting the values that contribute to vibrant democracy into versions of individual equality—as Hackney, Repetti, and Sugin all attempt to do—does not account for important aspects of democratic governance and how a democratic community should be constituted.[94]

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86. Franklin D. Roosevelt, Address to Congress (Apr. 29, 1938), *discussed in* SIDNEY RATNER, TAXATION AND DEMOCRACY IN AMERICA 16 (1967).

87. *See id.*

88. Philip T. Hackney, *Prop Up the Heavenly Chorus? Labor Unions, Tax Policy, and Political Voice Equality*, 91 ST. JOHN'S L. REV. 315, 322, 382 (2017) (focusing on the importance of the labor movement's political voice, and arguing that the tax policy promotes existing voice inequalities).

89. Repetti, *Democracy and Opportunity*, *supra* note 37, at 1142–43; Sugin, *supra* note 76, at 650–61.

90. Sugin, *supra* note 76, at 651.

91. *Id.*

92. Repetti, *Democracy and Opportunity*, *supra* note 37, at 1185 (describing their proposed "equity goal underlying a just government" as the "equal opportunity for self-realization and democracy").

93. *Id.*

94. This narrow focus strikes me as similar to the narrow focus on individual rights that has emerged from the one person, one vote doctrine. *See generally* Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 215 (2003) (distinguishing the individual right to register and cast a ballot and the group-oriented right to a "qualitatively undiluted vote").

Political process concerns have been integrated into equity in some other ways. Professors Repetti and Diane Ring have reinterpreted elements of tax equity by casting horizontal equity as a method that calls for public reason-giving when similarly situated people are treated differently.[95] Pointing in a somewhat different direction, Professor Brian Galle argued that some deference to previously made tax policy decisions should be integrated into equity analysis.[96] Galle saw this deference as a potential substitute for legislators imposing their own views about redistribution in policymaking. Galle suggested that the status quo distribution, being the result of the effects of previously enacted laws and policies, should be given some weight or deference as future policies are considered.[97] In short, the very fact of previous enactment justifies the equalities or inequalities established under prior policy. Although Galle did not precisely trace the political-theoretical grounding of this argument, one implication is that there is some sustaining positive value in democratically enacted tax policies.

But more generally, standard equity analysis today is generally agnostic to governing context.[98] Traditional equity analysis consists of a set of normative considerations that *might* incorporate effects on governing context and *might* include consideration of democratic values. But it certainly does not require such considerations, and often equity analysis proceeds in tax law scholarship without attentiveness to democracy, nor with concerns for public goods and collective power.[99] A recent exception evidences this general rule: Professor Ilan Benshalom argued in favor of greater redistribution on grounds that extreme inequality should be undone because economic "homogeneity is a precondition of effective democratic cooperation."[100] This new justification is grounded in the importance of collective action in democratic governance.[101]

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95. James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 FLA. TAX REV. 135, 145 (2012) (emphasizing political process concerns).

96. Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323, 1338 n.69, 1341 (2008) (citing JOSÉ MARÍA MARAVALL & ADAM PRZEWORSKI, DEMOCRACY AND THE RULE OF LAW 96 (2003)).

97. Galle, *supra* note 96, at 1342.

98. *See* James R. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Individual Income Tax*, 23 FLA. TAX REV. 522, 528–75 (2020) (connecting tax policy to rising inequality, which has had deleterious effects on democratic governance in the United States, and emphasizing that this aspect of equity analysis has been underappreciated).

99. *See* Christians, *supra* note 16, at 11–16 (describing standard frames of equity analysis).

100. Ilan Benshalom, *The Democratic-Homogeneity Case for Wealth Taxation* 3 (Hebrew Univ. of Jerusalem Legal Rsch. Paper Series No. 23-1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4250541 (last visited Aug. 22, 2023).

101. *Id.* at 3–4.

One possible explanation for the general disregard of collective power in traditional equity analysis is that the predominant normative underpinnings of tax equity scholarship are surprisingly inattentive to democratic values. The most significant influences in contemporary tax law scholarship are John Rawls, whose work tends to recommend redistribution, and Robert Nozick, whose work tends to recommend reduced taxation in the name of libertarian deference to market outcomes.[102] Rawls' theory of justice assumes a liberal democratic society, but generally approaches taxation as a limited tool that could help to produce a just distribution.[103] Tax policy, in this view, does not have anything do with democratic vibrancy beyond material distribution. Nozick, meanwhile, was adamant that the minimal state "utopia" was one that should exist *without* democratic institutions—the state would exist to provide security but, beyond that, the people would organize and socialize as they wished, without state interference or support.[104] These alternative philosophical approaches have shaped the last several decades of debates around taxation based on ability to pay or based on benefits received, which are the leading justifications for progressive taxation.[105] Collective power and commitment to strengthening democracy are nowhere to be seen in the underpinnings to standard equity analysis.

C. Administrability Through an 'Everyday Libertarian' Lens

Administrability is widely recognized as a critically important goal of any tax system.[106] Although, as Professor Allison Christians has noted,

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102. *See* Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71, 100–02 (1996); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991, 1998–99 (2004); Bankman & Griffith, *supra* note 64, at 1915–16.

103. JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993).

104. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); *see* Eric Mack, *Robert Nozick's Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Apr. 21, 2022), https://plato.stanford.edu/entries/nozick-political/ [https://perma.cc/ZG2B-4DYU].

105. *See* Christians, *supra* note 16, at 11–16. Of course, these are not new frameworks for considering tax equity. Utilitarianism, welfarism, and other frameworks proliferate, built on varied and extensive academic traditions. *See, e.g.*, JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 212–14 (Stephen Nathanson ed., 2004) (1848) (prescribing "equality of sacrifice" in taxation as the touchstone of "equality of taxation").

106. *See, e.g.*, Leandra Lederman, *Statutory Speedbumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 709–11 (2007) (defending administrability as a normative concern in tax policy, arguing that theoretically efficient or equitable taxes may be in-administrable, and dividing the criteria into two parts: "the ease of government enforcement and the ease of taxpayer compliance"); Leandra Lederman & Joseph C. Dugan, *Information Matters in Tax Enforcement*, 2020 BYU L. REV. 145, 150–51 (2020) (introducing discussion on the importance of tax administration practices relying on various common mechanisms to procure taxpayer information).

administrability "receives much less attention in tax policy discourse than equity and efficiency."[107] Administrability is focused on compliance and enforcement—what burdens do rules place on those who must follow them, and what measures must a tax authority undertake to implement and oversee the rules?[108]

Over the past several decades, tax administration reforms have regularly been animated by libertarian-flavored concerns about government overreach—politicians focus on protecting taxpayer rights against administrators who will use the power of the law and the authority vested in the Internal Revenue Service (IRS) improperly to victimize innocent taxpayers.[109] Congress has enacted various "Taxpayer Bills of Rights"[110] to hem in IRS authority and protect taxpayers from injustice in tax administration. Congress, concerned with heavy-handed government enforcement, established the Taxpayer Advocate Service to "protect taxpayers' rights."[111] Most recently, Congress enacted the Taxpayer First Act, much of which focused on public-facing customer service performance metrics.[112] Although government coercion is certainly a concern in democratic theory,[113] this libertarian lens on tax administration seldom pays heed to governing context.[114] Rather, the

107. Christians, *supra* note 16, at 23.

108. *See id.*

109. *See* 26 U.S.C. § 7803(a)(3) (codifying the Taxpayer Bill of Rights; Congress added this to the tax code in 2015); *cf.* Richard K. Greenstein, *Rights, Remedies, and Justice: The Paradox of Taxpayer Rights*, 91 TEMP. L. REV. 743, 745 (2019).

110. *E.g.*, Taxpayer Bill of Rights, Pub. L. No. 105-206, 112 Stat. 726 (1998) (codified as amended in scattered sections of 26 U.S.C.); *see also* Heather B. Conoboy, Note, *A Wrong Step in the Right Direction: The National Taxpayer Advocate and the 1998 IRS Restructuring and Reform Act*, 41 WM. & MARY L. REV. 1401, 1402 (2000) (summarizing the Taxpayer Bills of Rights that preceded the 1998 Act).

111. *About Us*, TAXPAYER ADVOC. SERV., http://www.taxpayeradvocate.irs.gov/about-us/ [https://perma.cc/L7BR-93F9]; Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 972 (2003) (describing how Congress determined that the IRS was "overzealous" in its enforcement, leading to the enactment of legislation that included the Taxpayer Bill of Rights 3 in 1998).

112. Taxpayer First Act, Pub. L. No. 116–25, 133 Stat. 981 (2019) (codified in scattered sections of 26 U.S.C.).

113. *See, e.g.*, Ludvig Beckman, *Deciding the Demos: Three Conceptions of Democratic Legitimacy*, 22 CRITICAL REV. INT'L SOC. & POL. PHIL. 412, 414 (2019) (discussing "the procedural requirements that *democrats* should accept as sufficient for the permissible uses of coercive power by the state").

114. This critique does not apply to the Taxpayer Advocate Service. *See supra* note 111 and accompanying text. Importantly, the Taxpayer Advocate regularly makes legislative recommendations, and its recommendations generally reflect a keen awareness of the democratic context of federal tax administration. *See* Danshera Wetherington Cords, *Nina E. Olson: A Legislative Legacy*, 18 PITT. TAX. REV. 139, 149 (2020). Moreover, the Taxpayer Advocate has focused on

literature on "taxpayer rights" calls for skepticism of the government and, hence, a focus on protecting individual rights.[115] The IRS is treated as a bogeyman, not as an agent of democratically-accountable officials controlled via laws of democratic provenance.[116] Murphy and Nagel have described this approach as "everyday libertarianism," which starts from a view that no individual should be compelled to do anything at the behest of the state and uses that to form an adversarial approach to any form of taxation or tax enforcement.[117]

Not all scholarship on administrability features libertarian undertones. A broad array of tax administration scholarship has zeroed in on various distinct issues: information asymmetries between taxpayers and tax administrators,[118] filing requirement and self-assessment,[119] penalty regimes,[120] taxpayer privacy and transparency,[121] complexity,[122] and

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taxpayer rights, particularly from the perspective of low-income taxpayers who cannot afford or do not have the necessary social networks to benefit from professional tax assistance. *Id.*

115. *See, e.g.*, Richard A. Epstein, *Taxation with Representation: Or, the Libertarian Dilemma*, 18 CAN. J.L. & JURIS. 7, 9–15 (2005) (dissecting Robert Nozick's claim that taxation is "on a par with" slavery and concluding that coercive taxation by a democratic state need not be rejected outright by libertarians (quotation marks omitted)). *See generally* Alice G. Abreu, Temple Law Review *Symposium: Taxpayer Rights: All the Angles*, 91 TEMP. L. REV. 679 (2019) (summarizing a symposium that featured academics, government officials, and practitioners all focused on taxpayer rights).

116. *Cf.* SAEZ & ZUCMAN, *supra* note 20, at 113–14 (describing this sentiment as a global phenomenon, with skeptics of taxation promoting "tax competition" as a backstop to what they see as insufficient "checks and balances" in tax administration).

117. MURPHY & NAGEL, *supra* note 61, at 34–35; Epstein, *supra* note 115, at 9–10.

118. Lederman & Dugan, *supra* note 106, at 147; Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733 (2010).

119. *E.g.*, MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES 48–49 (2008) (discussing efforts to eliminate the return filing requirement for the federal income tax as well as efforts by Professor Joseph Bankman in California); Bret Wells, *Voluntary Compliance: "This Return* Might Be *Correct but* Probably *Isn't,"* 29 VA. TAX REV. 645 (2010) (criticizing self-assessment as facilitating underreporting of income); Emily Cauble, *Time for a Tax Return Filing Fee*, 58 HARV. J. ON LEGIS. 103 (2021) (critiquing the varied filing burdens imposed on different taxpayers, and proposing filing fees based on complexity of returns).

120. *E.g.*, Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111 (2009).

121. *E.g.*, Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265 (2011); Michael Hatfield, *Privacy in Taxation*, 44 FLA. ST. U. L. REV. 579 (2017); Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449 (2017).

122. *E.g.*, Leandra Lederman & Stephen W. Mazza, *Addressing Imperfections in the Tax System: Procedural or Substantive Reform?*, 103 MICH. L. REV. 1423, 1441–44 (2005) (reviewing DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE (2003)); GRAETZ, *supra* note 119, at 89–93 (discussing different sources of complexity); Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 650–51 (2003) (lamenting politicians harping on complexity and defending it as, among other things, necessary to mediate concerns about equity and efficiency).

examination and other enforcement methods,[123] among others. And some of this scholarship has engaged with democratic governing context, though this is not a leading concern in the literature.[124]

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Because the U.S. federal tax system operates within a "consent" jurisdiction in Schön's nomenclature,[125] it matters that the standard normative considerations that occupy tax scholars in the United States mostly disregard what the tax system might mean for the structure and operation of a democratic government. Even though scholars in other fields of law are turning to the tax system for help,[126] there has been insufficient consideration of these issues among tax scholars. We, collectively, have not examined whether and how particular tax laws and policies might shape democracy, and how the tax system might be used to strengthen or undermine democratic institutions and practices.

D. Limited Focus on Democratic Processes

Some tax scholars have looked at the *process* for making tax policy (i.e., employed analysis distinct from considering the *substance* of those policies) and, in so doing, have worked outside the standard frameworks of equity, efficiency, and administrability. This work draws from other areas of law and political science to consider how democratic institutions and norms affect tax policies.[127] For example, Professor Rebecca Kysar examined how particular constraints in the lawmaking process have shaped substantive tax laws, including the use of phase-ins and sunsets.[128]

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123. *E.g.*, Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679 (2013); Lederman & Mazza, *supra* note 122, at 1430; Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499 (2012); Leandra Lederman, *Valuation as a Challenge for Tax Administration*, 96 NOTRE DAME L. REV. 1495 (2021).

124. For example, some of the scholarship on complexity engages with democratic context. *See, e.g.*, Leandra Lederman, *Does Enforcement Reduce Voluntary Tax Compliance?*, 2018 BYU L. REV. 627, 649–51 (2018) (discussing political context as contributing to "intrinsic compliance motivation" and providing a potential explanation for varied rates of voluntary compliance).

125. *See supra* notes 39–41 and accompanying text.

126. *See supra* notes 2–3, 5–12 and accompanying text.

127. *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998); McCaffery, *supra* note 102, at 93 (observing that substantive tax law is a product of—and varies based on—decision-making structures that produce and enact the law).

128. Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1017–20 (2011); *see also* Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335 (2006).

Some scholars have critiqued the democratic bona fides of specific tax laws or endorsed laws on the basis of the democratic process that produced the law.[129] Others have examined pathologies in the tax legislative process that affect the tax system.[130] This kind of commentary has enriched tax scholarship and introduced important consideration of democratic values into tax policy discourse. But it has also been limited in scope, generally focusing on how democratic processes shape substantive tax rules, not the reverse.

II. DEMOCRACY AS CRITERIA FOR TAXATION

Although many tax scholars would agree that taxation shapes democracy, the point has been underexamined, as the standard criteria provide limited angles for such analysis.[131] This Part presents a set of democracy criteria to help illuminate the democratic perspective on taxation and to provide a way to more thoroughly evaluate how specific tax policies might shape democratic governance.

To put the potential effects of tax on a democratic system of government in perspective, first consider taxation in a different system of government—an autocracy. Autocratic rule is essentially the opposite of democracy—rule by one instead of rule by many.[132] What would be the ideal tax policy in an autocracy? If the autocrat wants to maintain power and satisfy their personal governing preferences, the autocrat might think to impose tax policies that strategically extract resources from the hands

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129. *E.g.*, Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1182–84 (1993); Susannah Camic Tahk, *Making Impossible Tax Reform Possible*, 81 FORDHAM L. REV. 2683, 2687–90 (2013); Wallace, *Democracy Avoidance, supra* note 21 (critiquing the public choice framework as insufficiently attentive to democratic considerations).

130. *E.g.*, Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 L. & CONTEMP. PROBS. 99, 104–06 (2018) (explaining the Byrd rule in the United States Senate, which generally prohibits budget reconciliation bills from increasing the deficit beyond the budget window considered in the budget resolution, among other things); Michael Doran, *Legislative Entrenchment and Federal Fiscal Policy*, 81 LAW & CONTEMP. PROBS. 27, 28 (2018) (describing "legislative entrenchment" as "legislative action that prevents or hinders action by a simple majority in a subsequent legislature"); Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 388–90 (1998) (critiquing the process by which Congress enacts tax subsidies); Jonathan H. Choi, *Tax Commitment Devices*, 15 J. BUS. & SEC. L., 1, 38 (2014) (considering stability in tax laws imposed by way of entrenchment devices from a democratic perspective).

131. A recent and important exception is Benshalom, *supra* note 100.

132. An autocracy is a form of government where power is concentrated in the individual head of state; contemporary examples include Saudi Arabia, with its royal family, or the hereditary dictatorships that control North Korea and Syria.

of citizens into government coffers.[133] That might mean targeting taxation on disfavored people or industries and empowering some at the expense of others;[134] it might mean using the tax system to impoverish almost everyone,[135] or using taxes to maintain a particular standard of living for a targeted section of the population.[136] From the perspective of the autocrat, any of these objectives could be justified—the optimal tax policy would help to support and sustain the autocrat's power.[137] In the design of tax policies for an autocracy, it is evident that standard tax policy concerns of efficiency, equity, and administrability would yield to autocratic politics.

Of course, the features of a tax system that would bolster an autocracy are quite different than the features of a tax system that would help a

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133. For example, the Assad regime in Syria enacted a "reconstruction" surtax around 2012—i.e., as the civil war unfolded in that country. Despite the publicly stated purpose of using funds to rebuild civilian homes that were being destroyed by the war, the government appears to have used the money "to maintain itself and ensure its continuity either by using it for police and security matters or to finance itself." Mohammad Bassiki & Nick Mathiason, *Syria's Reconstruction Tax Props Up the Assad Regime*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (May 24, 2021), https://www.occrp.org/en/blog/14459-syria-s-reconstruction-tax-props-up-the-assad-regime [https://perma.cc/P5KP-8ANL] (quoting Haid Haid, an expert on Syria).

134. For example, in Russia over the past few decades, benefits from a variety of government policies intended to enrich and reward supporters of the current leadership have accrued to state-owned corporations, such as Gazprom, as well as select private companies connected to Vladimir Putin. *See* ANDERS ASLUND, RUSSIA'S CRONY CAPITALISM: THE PATH FROM MARKET ECONOMY TO KLEPTOCRACY 139–53 (2019).

135. For example, the North Korean tax system consists of value-added charges on goods and services provided by government-controlled businesses. *See* Yoo Gwan Hee, *Tax? What Tax? The North Korean Taxation Farce*, DAILY NK (Apr. 5, 2010, 10:36 AM), https://www.dailynk.com/english/tax-what-tax-the-north-korean-taxa/ [https://perma.cc/NNQ4-9Y5P]. The estimated GDP per capita in North Korea was $1,700 in 2015, the most recent year available, compared to over $40,000 in democratic South Korea). *Country Comparisons—Real GDP Per Capita*, CIA WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/field/real-gdp-per-capita/country-comparison/ [https://perma.cc/4G5S-FZBZ].

136. For example, Saudi Arabia imposes taxes on the oil and gas industry and has a value-added tax, which is used to provide free education to some citizens as well as land and house loans to many; generally, the Saudi government has hidden extractive public finance from view of its citizens so as to appear to provide benefits to them with no cost. *See* Abdallah Fayyad, *Saudi Arabia Isn't Just Raising Taxes*, ATLANTIC (June 11, 2020), https://www.theatlantic.com/international/archive/2020/06/saudi-arabia-taxes-coronavirus-pandemic/612493/ [https://perma.cc/AN48-8SNS]; *Saudi Arabia - Poverty and Wealth*, ENCYCLOPEDIA NATIONS, https://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Saudi-Arabia-POVERTY-AND-WEALTH.html [https://perma.cc/5LPG-E7PB].

137. *See, e.g.*, Ronald Wintrobe, *Rent Seeking and Redistribution Under Democracy Versus Dictatorship*, *in* THE DEMOCRACY SOURCEBOOK 427 (Robert Dahl, Ian Shapiro & José Antonio Cheibub eds., 2003) (modeling redistribution in a dictatorship as compared to a democracy). *See generally* DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY (2006) (modeling economic development under different political systems, and generally assuming that the ruling class will tax the non-ruling class).

democracy to succeed and endure.[138] In a democracy where the people are supposed to be sovereign, a tax system could not legitimately be designed to serve one person's whims.[139] Further, just as tax policy can be used in an autocracy to control and subjugate the population, the tax system in a democracy could empower the people to act as effective and engaged participants in government.[140] Tax policy might be used intentionally to strengthen and support the democratic system of governance, or it might, through misguided policy choices, undermine the government.[141]

At a very abstract level, democratic theory is concerned with how to "shape the power dimensions of collective activities."[142] This raises an array of questions, including: Which decisions are to be made by *the people*? Who are *the people*? How are the decisions made? Democratic theorists query what circumstances might make it "more likely [for a democracy] to survive and thrive," recognizing that even in advanced democratic countries the ongoing vitality of democracy is not assured.[143]

The democracy criteria for taxation explored here are motivated by my belief that the "success or failure" of attempts to use the tax system to share resources and power is "bound up with the fate of democracy."[144] The criteria introduced below ask how tax law and policy can be oriented to deliberately strengthen democratic governance. Professor Ian Shapiro suggests some foundational elements of successful democratic states: cultural practices, institutional arrangements, and economic

138. *See* Ajay K. Mehrotra, *Fiscal Forearms: Taxation as the Lifeblood of the Modern Liberal State*, *in* THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL 284–86 (Kimberly J. Morgan & Ann Shola Orloff eds., 2017) (describing the differences in revenue raising between democratic and autocratic states as "one of the defining distinctions" between the two); Wintrobe, *supra* note 137; *see also* Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 679, 689–90 (2009) (exploring democratic legal theory as contrasted with theories of law that might apply in other systems of government such as "monarchies, dictatorships and so on").

139. *See* Waldron, *supra* note 138, at 688–90 (contrasting democratic conceptions of legitimacy that focus on who made the decision with other systems of government in which "the 'Who'" yields to other justifications); *cf.* ARISTOTLE'S POLITICS: WRITINGS FROM THE COMPLETE WORKS 142–45 (Jonathan Barnes ed., 2016) (suggesting that all members of a community should be permitted to participate in governance).

140. *See infra* section II.B.

141. For example, Charles Tilly described a "mobilization-repression-bargaining cycle[]" that might be prompted by taxation, which causes the subject population to bargain with the state and demand future rights, and he also contemplates that taxation can lead to "conscription, or confiscation of property" and cause a rebellion, as in the American Revolution. *See* CHARLES TILLY, DEMOCRACY 142–43 (2007).

142. IAN SHAPIRO, DEMOCRATIC JUSTICE 18 (1999) [hereinafter SHAPIRO, JUSTICE].

143. IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 86 (2003) [hereinafter SHAPIRO, THEORY].

144. RATNER, *supra* note 86, at 13.

considerations.[145] Tax law and policy can affect each of these and the sections that follow explore different aspects of how tax can be used to strengthen democracy on these three margins. Together, these concerns constitute a menu of democracy criteria, which I propose should be considered alongside the traditional criteria of efficiency, equity, and administrability. The democracy criteria can generally inform tax law by reference to a wide variety of normative commitments within democratic theory, although the specifics and emphasis of how tax should support democracy varies depending on the model of democracy to which one aspires.[146]

In the sections that follow, I introduce and discuss in more detail several considerations that might fit into any model of democracy. Section II.A addresses how taxation can affect democratic community members' faith in democratic governance.[147] Tax rules have been shown to contribute to cultural aspects of loyalty to country and to a sense of obligation and commitment to rule of law generally. Section II.B addresses particular features of the tax system that can affect how democratic institutions function and the extent to which democratic community members have a say in their democracy.[148] Further, tax revenue can directly support the institutions necessary for democracy, making them strong and effective or, alternatively, leaving them to atrophy and falter. Finally, section II.C discusses concerns about domination and how taxation can shape power relations, and, more broadly, economic activity throughout society in ways that redound to the benefit or detriment of democratic governance. The redistributive function of tax has a democratic valence that extends beyond economic differences between community members, and taxation allows a government to manage the economy for stability and inclusivity.[149]

A. Promoting Faith in Democracy

Democratic institutions should be oriented towards "engendering confidence in people about their ability to govern themselves."[150] This section considers how tax laws can be used to promote such confidence,

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145. SHAPIRO, THEORY, *supra* note 143, at 86–100.

146. *See infra* section III.A (discussing various alternative models of democracy and how the democracy criteria might apply to emphasize different points in each).

147. *See infra* section II.A.

148. *See infra* section II.B.

149. *See infra* section II.C.

150. FRANK CUNNINGHAM, THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION 28 (2002) (citing John Stuart Mill).

suggesting two mechanisms. First, tax laws can serve a "communicative" function by expressing shared values among members of the democratic community that can reinforce collective decision-making.[151] Second, competent government helps to strengthen community members' faith in their democracy and, conversely, state incompetence undermines faith in democracy.[152] Each of these potential faith-building aspects of taxation—communicative value and competence—are addressed in turn below.

1. Communicative Value

Tax law can contribute to faith in democracy by sending encouraging and unifying signals to and among members of the democratic community. Political philosopher Seanna Shiffrin emphasized this "communicative value" of democratic laws.[153] Shiffrin's important work stands out for its focus on governing context and for distinguishing the role of law in *democratic* governments as compared to other governing contexts.[154] In Shiffrin's analysis, democratic government provides a shared forum for expressing mutual respect for one another and for exhibiting political equality. Professor Shiffrin argued that laws generally play an important "constitutive" role in realizing the "communicative value" of democracy.[155] Tax laws are particularly well suited to respond to "the communicative challenge" Shiffrin outlined in democratic decision-making.[156]

In a democratic government, tax laws can communicate values such as respect and political equality that bolster support for democratic governance. Scholars and policymakers recognize that "taxation is one of the most significant mechanisms for interaction between states and individual citizens."[157] Because of its required and universal nature, the

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151. *See* SHIFFRIN, *supra* note 23, at 18–19.

152. *Cf.* Samuel Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV. 485, 513–16 (2018) (describing evidence that over approximately 200 years, democracies have been highly competent—more so than other systems of government—as indicated by increasing standards of living, promoting education, and building and harnessing strong militaries that have not presented internal threats to democratic governance).

153. SHIFFRIN, *supra* note 23, at 18.

154. *Id.* at 16–19.

155. *Id.* at 18.

156. *Id.* at 26.

157. Martin O'Neill & Shepley Orr, *Introduction*, *in* TAXATION: PHILOSOPHICAL PERSPECTIVES 1, 1 (Martin O'Neill & Shepley Orr eds., 2018) (observing also that "[t]he tax system is central to the operation of states and to the ways in which states interact with individual citizens"). *See generally* OECD, BUILDING TAX CULTURE, COMPLIANCE AND CITIZENSHIP: A GLOBAL SOURCE BOOK ON TAXPAYER EDUCATION (2d ed. 2021), https://www.oecd-ilibrary.org/docserver/18585eb1-

act of paying taxes stands out among forms of civic engagement. As Professor Sven Steinmo observed: "[e]ven ardently antipolitical citizens—those who don't read the newspapers, don't watch TV news, don't vote, and refuse to discuss politics at any time—pay taxes."[158] The universality and reach of tax laws is singular, which allows that tax compliance—acts of filing tax information, maintaining records, facilitating reporting, and remitting amounts owed—might be used to bolster cohesiveness, unity, and trust. Engaging with the tax system, even simply by complying with tax laws, can allow people to communicate and develop reciprocal trust in one another and in their government institutions.[159]

Consideration of the communicative value of tax laws also suggests approaching substantive tax rules—not just tax compliance—with a democratic perspective. For example, Professor Deborah Schenk argued that one justification for a wealth tax is that it ensures that every citizen is required to "participate in the funding of public goods by paying an appropriate share of their cost."[160] Professor Schenk made the point that wealthy individuals who can engage in tax planning and change their behavior to avoid income tax liability and even consumption tax liability are then off the hook for contributing to the common good.[161] Professor Schenk used the term "appropriate"[162] based on an equity notion of shared obligations that should increase with available resources;[163] this concept also has communicative purchase in that requiring those with the most resources to share the tax burden may work to express solidarity across a community. Alternatively, a tax policy that does not require the wealthiest

en.pdf?expires=1695070260&id=id&accname=ocid195064&checksum=E621DC92B0670FA305F93815FD515D20 [https://perma.cc/7BKU-Z4M9] (focusing on helping developing countries collect revenue in such a way that "citizens see paying taxes as an integral aspect of their relationship with their government" and describing taxpayer education as "bridg[ing] the gap between tax administrations and citizens").

158. SVEN STEINMO, TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE 194 (1993).

159. *See* LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 50–54 (2013).

160. Deborah H. Schenk, *Saving the Income Tax with a Wealth Tax*, 53 TAX L. REV. 423, 468 (2000).

161. *Id.* at 467–69.

162. *Id.* at 468.

163. *See id.* at 470 (explaining that, in the example of a consumption tax, "[a] tax that permits a citizen to pass this obligation to another by failing to consume is incompatible with democracy").

to pay taxes (a familiar concern today)[164] might "breed resentment," communicating the wrong messages.[165]

The allocation of resources has powerful communicative effects in a democratic government, and tax scholars working with the standard normative equity criteria have given extensive attention to distributive effects of tax laws, though usually not with an eye toward democratic vitality.[166] Professor Shiffrin noted that even if the laws were to establish a "just allocation of material resources,"[167] that does not necessarily fulfill the communicative role of laws in democracy.[168] At the same time, any given resource allocation may be "compatible with mutual indifference, grudging accommodation, or even mutual contempt should the penalties for destructive behavior be severe enough to induce patterns of compliance."[169] Beyond the resulting distribution, laws may contribute to or detract from establishing a political environment of mutual respect among community members.

There are currently significant ways in which the existing U.S. tax system seems to undermine democratic governance by communicating messages and values that undermine faith in democracy. The filing requirement gives rise to perennial and widespread complaints about the individual income tax.[170] The federal tax system requires self-assessment, despite the fact that the use of information returns mean that the IRS collects sufficient information from employers to accurately determine most taxpayers' liabilities.[171] Complaints about the burdens of filing have recently found new audiences via social media. A whole subgenre of

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164. *See* SAEZ & ZUCMAN, *supra* note 20, at vii–xi; *see also infra* section III.B.

165. *See* Liam Murphy, *Why Does Inequality Matter?: Reflections on the Political Morality of Piketty's* Capital in the Twenty-First Century, 68 TAX L. REV. 613, 616 (2015) (citing books V and VI of ARISTOTLE'S POLITICS, *supra* note 139).

166. *See generally* STEVEN M. SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE 69–177 (2013) (discussing the importance of perceptions of tax fairness). Professor Benshalom's recent work makes the case that economic homogeneity is a democratic virtue. *See* Benshalom, *supra* note 100.

167. SHIFFRIN, *supra* note 23, at 28.

168. *Id.* at 19.

169. *Id.* at 28.

170. There is a debate among tax scholars focused on administrability as to the merits of requiring tax returns, and scholars on both sides of the debate referenced democratic values from time to time. *Compare* GRAETZ, *supra* note 119, at 4 (critiquing the return filing system and focusing primarily on fairness and efficiency, but also noting that an effective tax system is a democratic imperative), *with* ZELENAK, *supra* note 159 (arguing that return filing enhances democratic citizenship).

171. *Cf.* Joseph Bankman, *Simple Filing for Average Citizens: The California ReadyReturn*, TAX NOTES (Tax Analysts, Falls Church, Va.), June 13, 2005, at 1431–32 (on file with author) (focusing on a California proposal to eliminate the filing requirement, and noting that IRS information returns provided to the state provide most of the information needed to determine income tax liability for most filers).

TikTok videos has emerged in which young people make light of the fact that they are required to file tax returns. One video, viewed approximately 10,800,000 times with nearly 15,500 comments as of August 2023, proceeds as follows:

> Young person: *Hi, I'm 18 years old and this is my first time paying taxes and I really don't know what I'm doing. Can you tell me how much I owe, and I'll just pay it?*
>
> IRS employee (played by same young person): *No, we can't do that, you have to figure out that amount for yourself.*
>
> Young person: *Oh ok, well if I'm just a little bit off in the amount I owe, it will be ok because it's my first time, right?*
>
> IRS employee: *Oh no, we already know how much you owe, exactly . . . I mean, down to the penny. But you still have to figure that out for yourself.*
>
> Young person: *Well, what if I get that amount wrong?*
>
> IRS employee: *You go to federal prison.*
>
> Young person: *What?*[172]

If millions of young people are learning that their government is essentially "out to get them," this should be approached as a serious challenge to the democratic system of government, not simply an administrability puzzle or an inefficient use of resources.[173] The challenge reaches deep into the relationship between citizens and democratic governance, deeper than has generally been appreciated in the existing literature. A democratic perspective on taxation allows us to see this kind of perceived disfunction as a challenge to democratic governance, one that should be confronted by reforms to the tax system that are oriented around the democratic salience of taxation.

Professor Lawrence Zelenak pursued something along these lines in their work on "fiscal citizenship."[174] In defense of the mass-return system, Zelenak observed that the complexity of current-day tax rules "may leave

172. Nanny-Maw (@nannymaw), TIKTOK, (Nov. 23, 2020) https://www.tiktok.com/t/ZT82GECKY/ (last visited Aug. 24, 2023) (transcript on file with author). The legal analysis presented is not entirely correct: a small error on a single tax return would not generally result in criminal tax charges nor federal prison; more likely, it would result in being required to pay the extra amount owed plus interest, as well as a penalty for underpayment (which, for first time offenders, can usually be abated).

173. *See* GRAETZ, *supra* note 119, at 14–15 (emphasizing the resources wasted by the filing requirement, and the inaccuracy that results from it).

174. *See* ZELENAK, *supra* note 159, at 50–54.

taxpayers with a sense of rage rather than a sense of fiscal citizenship."[175] However, Zelenak emphasized the "tax consciousness" that results from the requirement to submit an annual income tax return, noting that this "calls the taxpayer's attention to the total amount of income tax that he has paid over the past year . . . [so that] taxpayers may reflect—as they should—on whether they are receiving good value from the federal government for their income tax dollars."[176] Zelenak described the existing return-based system as a "compromise between big-government proponents (who generally favor low-visibility, low-pain taxes . . .) and small-government proponents (who would prefer taxes to be as visible and as painful as possible . . .)."[177] Zelenak defended the compromise on the grounds that "if trust breeds trust[,]then a taxpayer who feels trusted by the government may respond with increased trust in the government."[178]

In some respects, this argument presages Shiffrin's focus on the communicative potential of laws in democracy. Zelanak made the case that trust in government promotes trust in others more broadly, which in turn has been shown to result in greater tax compliance.[179] The potential that this communicative element of tax laws could point in different directions on the issue of return filing shows that the democracy criteria is not a simple prescriptive formula. Democracy takes on different forms, the democratic process is contextual, and democratically oriented goals may vary. A focus on promoting and strengthening democracy begs further specification about what normative democratic commitments one is seeking to advance.[180]

The communicative value of tax law for democracy might affect both tax administration and the content of laws, suggesting that both should be designed with consideration for improving the community's shared experiences and trust in the system.

175. *Id.* at 8–9 (urging a significant simplification of the substantive rules and, for many taxpayers, the self-assessment and filing process by way of the IRS preparing tentative returns for taxpayers with "relatively simple tax situations"). *But see* Donaldson, *supra* note 122, at 651 (cautioning that the preparation of tax returns by the IRS could have negative consequences).

176. ZELENAK, *supra* note 159, at 3–4.

177. *Id.* at 6.

178. *Id.* at 50.

179. *Id.* at 52 (discussing Robert D. Putnam's *Bowling Alone* on the benefits of increased social capital).

180. *See infra* section III.A (discussing the relationship of different models of democracy to tax policies arising out of the different considerations and foci within the democracy criteria).

2. *Competent Government*

In addition to communicative value, tax laws can be used to build faith in democracy by exhibiting competence. United States tax scholars have long recognized that tax systems generally—and the mass income tax in particular—provide a unique interface between a democratic government and its people.[181] All or almost all community members will have direct personal experience with their government via tax compliance.[182] Because of this interaction, tax laws can promote faith in democratic government when tax laws are competently formulated and administered. In the United States, taxation is one of the *only* ways most community members participate directly in their government.[183] Consider the other means of participation. Voting is voluntary,[184] and voting rates in the United States are quite low.[185] Jury duty is a limited and infrequent engagement.[186] Only a small portion of the population is employed by any level of

181. *See, e.g.*, Mehrotra, *supra* note 138, at 285 ("Because taxation is one of the most widely and persistently experienced relationships that individuals have with their government, it helps define the social and cultural meaning of citizenship."); ZELENAK, *supra* note 159, at 4 ("For most of the people most of the time, the most prominent and meaningful connection with the federal government is through the income tax.").

182. O'Neill & Orr, *supra* note 157, at 1.

183. *See* Christopher L. Eisgruber, *Civic Virtue and the Limits of Constitutionalism*, 69 FORDHAM L. REV. 2131, 2139 (2001) (describing "taxpayer" as one of the two principal modes of citizen participation in government during peacetime and describing the taxpayer role as one that "inspires resentment"); *see also* ZELENAK, *supra* note 159, at 17.

184. Some countries, including Australia, Argentina, and Brazil, have "compulsory" voting, requiring participation or submission of an explanation of their decision to abstain, or else citizens face fines or even imprisonment. *Compulsory Voting*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting [https://perma.cc/VN3B-LZK2].

185. In the 2020 Presidential election, 66.8% of U.S. citizens aged eighteen or older voted, which marked the highest turnout since at least 2000. Jacob Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html [https://perma.cc/2URP-GJD3].

186. One study found that less than 1% of the U.S. population serves on a jury each year (just less than 15% of the population is summoned to jury duty, and of those, only 5% actually serve on a jury, approximately 0.75% total), and fewer than 200,000 people total served on federal juries in 2016. *See* John Gramlich, *Jury Duty is Rare, but Most Americans See It as Part of Good Citizenship*, PEW RSCH. CTR. (Aug. 24, 2017), https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/ [https://perma.cc/TL73-E7MF].

government,[187] and fewer still volunteer for military service.[188] Direct engagement with policymaking is rare—few community members engage in participatory budgeting or lobbying.[189] The role of the taxpayer is unique in democracy because paying taxes is required of almost everyone and is an ongoing obligation.[190]

Perhaps reflecting this pervasiveness, tax paying is widely viewed as an important element of Americans' civic duties. One poll found that paying taxes is perceived to be among the very top "good citizenship traits," with seventy-one percent of Americans agreeing that paying all taxes owed is "very important to good citizenship," second only to voting.[191] The IRS's survey data shows that ninety-three percent of

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187. About 14.6% of the population works in federal, state, and local government jobs. *Class of Worker in United States*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/vizwidget?g=0100000US&infoSection=Class%20of%20Worker&type=chart&chartType=bar [https://perma.cc/Q53W-ZGGU].

188. Around two million people total serve in the military, including active duty (approximately 1.35 million) and reserves (approximately 786,000). DEF. MANPOWER DATA CTR., DEP'T DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE AND SERVICE (Mar. 31, 2021), https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports (scroll to the section with the header "Active Duty Military Personnel by Service by Rank/Grade" and select "March 2021"); DEF. MANPOWER DATA CTR, DEP'T DEF., SELECTED RESERVES BY RANK/GRADE (Mar. 31, 2022), https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports (scroll to the section with the header "Selected Reserve Personnel by Reserve Component and Rank/Grade" and select "March 2022").

189. In 2021, there were just over 12,000 lobbyists registered with the federal government. OPEN SECRETS, https://www.opensecrets.org/federal-lobbying [https://perma.cc/E57E-HKV5]. A report celebrating the growth of participatory budgeting claimed that from 2015 to 2016, over 100,000 people cast votes in participatory budgeting processes in the United States and Canada combined. PUBLIC AGENDA, A PROCESS OF GROWTH: THE EXPANSION OF PARTICIPATORY BUDGETING IN THE UNITED STATES AND CANADA IN 2015–16, at 9 (2016), https://publicagenda.org/wp-content/uploads/AProcessofGrowth_PublicAgenda_2016.pdf [https://perma.cc/X8UB-NBZ3].

190. *See generally* Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555 (2002) (discussing civic elements of taxpaying that they argued make taxpaying similar to voting and that demand further consideration of political equality in tax policy). Estimates of tax compliance are surprisingly high and consistent. The IRS has reported fairly consistently that the voluntary compliance rate—that is, the "amount of taxes paid voluntarily" and on time over the total tax owed—is around eighty-three percent. Daniel Hemel, Janet Holtzblatt & Steve Rosenthal, *The Tax Gap's Many Shades of Gray* 6 (Univ. of Chi. Coase-Sandor Inst. for L. & Econ., Working Paper No. 938, 2021), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2613&context=law_and_economics [https://perma.cc/F47S-ERBH] (citing I.R.S. Pub. 1415, No. 10263H (Sept. 2019), https://www.irs.gov/pub/irs-pdf/p1415.pdf [https://perma.cc/ZL7S-BBD3]).

191. John Gramlich, *What Makes a Good Citizen? Voting, Paying Taxes, Following the Law Top List*, PEW RSCH. CTR. (July 2, 2019), https://www.pewresearch.org/fact-tank/2019/07/02/what-makes-a-good-citizen-voting-paying-taxes-following-the-law-top-list/ [https://perma.cc/76J8-D58A].

Americans agree that "it is every American's civic duty to pay their fair share of taxes."[192]

Because taxpaying is so widespread, tax laws provide an opportunity to enhance faith in government by acting as a venue for the government to show its competence. If tax laws cause community members to think that their polity is working well and that people are, indeed, paying their fair share, it can strengthen democracy.[193] On the other hand, as Professors Emmanuel Saez and Gabriel Zucman queried, "[i]f the taxes enacted by our elected officials keep boosting the income of a privileged minority, who will keep faith in democratic institutions?"[194] A tax system that seems to let those with more economic resources off the hook will undermine democratic faith.[195] Faith in democratic competence via tax is not just a matter of distributional outcomes.[196] As Professor Kristin Hickman observed, "[t]he IRS and its personnel lack the expertise to assess the political consequences of many of the day-to-day administrative decisions that must be made," resulting in taxpayers questioning the "fairness and legitimacy of the tax system."[197]

In contrast, there is a tendency in autocratic and authoritarian governments to hide taxes. This has been explained as a tool of entrenchment for the government, done out of fear that more visible taxes would "empower people to demand more from their government," thus acting as a "trigger for democratization."[198] Robin Einhorn observed a similar phenomenon in the differences between early colonial governments in North America: while the more democratic northern colonies like Massachusetts established many different sorts of mechanisms for democratic debates and decision-making to establish tax

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192. I.R.S, COMPREHENSIVE TAXPAYER ATTITUDE SURVEY (CTAS) 2021: EXECUTIVE REPORT 7 (2022), https://www.irs.gov/pub/irs-pdf/p5296.pdf [https://perma.cc/E5NN-NSSN].

193. *Cf.* VANESSA S. WILLIAMSON, READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES (2017) (tying taxpaying to social cohesion and arguing, in part, that how people feel about how they pay taxes should be a consideration in administrability); ZELENAK, *supra* note 159 (making a similar point to Williamson); ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 18 (2018) (urging progress towards an "inclusive tax system that embraces all Americans" as necessary to "maximize[] the ability of all Americans to flourish").

194. SAEZ & ZUCMAN, *supra* note 20, at xi–xii.

195. ROBERT A. DAHL, ON DEMOCRACY 38 (2d ed. 2015) (recognizing the potential value of resource redistribution to prevent inequality that might undermine faith in democracy and effectiveness of democratic governance).

196. *Cf. id.* at 2 (citing questions around whether "government officials could or would cope fairly or successfully with issues like . . . taxation" as a source of declining confidence in democracy generally).

197. Kristin E. Hickman, *The IRS's Multi-Mission Mismatch Problem*, TAX NOTES (Tax Analysts, Falls Church, Va.), Mar. 14, 2016, at 1349 (on file with author).

198. Fayyad, *supra* note 136.

laws and to apply those laws equitably, southern colonies like South Carolina were much less democratic and operated by way of centralized, top-down decision-making.[199] The existence of democratic institutions and practices created an outlet for discontent in the North, while the South lacked forums for people to express displeasure, contributing to a (misleading) image of contentment in the South.[200] Einhorn attributed this difference to democratic governing structures encouraging public debate: silence in the South did not necessarily indicate amicable agreement.[201] Indeed, tax laws in the South were generally less equitable, less transparent, and less effectively administered than tax laws in the North.[202]

Scholars in other disciplines have found that building faith in democracy has been important historically in the development of democratic states, and that tax laws have played a role in this development. Sociologist Charles Tilly found broad-based taxation at the center of the development of modern democracies, and Tilly tied the rise of democracy in Europe to the privatization of the economy; as governments stopped earning revenue via control of commercial interests, they needed to impose taxes to fund government activities, which prompted the private interests subject to tax to push for a share in government power.[203] Further, Tilly observed that the early American federal government's use of tax collectors provided a rare point of "direct contact" with the potential to foster trust between state and citizen.[204]

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199. Robin L. Einhorn, *Liberty, Democracy, and Capacity: Lessons from the Early American Tax Regimes*, *in* THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE 155, 156–58, 167–71 (Isaac William Martin, Ajay K. Mehrotra & Monica Prasad eds., 2009) [hereinafter *Liberty, Democracy, and Capacity*].

200. *Id.*; *see also* EINHORN, *supra* note 79, at 99 (describing the ruling class as taxing themselves and lower class white settlers as "basically irrelevant" to political decisions until after the American Revolution); *cf.* NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA 5 (2017) (describing South Carolina as an outlier among early colonies for its extremely centralized governing structure, which served to protect the institution of slavery in the state).

201. *Liberty, Democracy, and Capacity*, *supra* note 199, at 171. Einhorn argued that the relatively undemocratic structures in the South contributed to the fable of Jeffersonian democracy and the idea that in the South white yeoman farmers were content in their poverty relative to enslaving plantation owners. *Id.*

202. *See generally* Einhorn, *supra* note 80 (examining these differences and arguing that the effects of these early tax policy structures and institutions are still evident in current-day tax policies in states and localities).

203. TILLY, *supra* note 141, at 142 (describing the "mobilization-repression-bargaining" cycle whereby subject populations consent to taxation in exchange for "some specification of the parties' future rights").

204. *Id.* at 80, 88 (arguing that trust is an important element of democratic political life and that contact promotes trust, but because opportunities for direct contact between state and subject are generally rare, "intermediaries" can play an important role; however, tax collectors and the postal service provided direct contact in the early American republic).

Others have found support for tax-fueling-democracy narratives in the unfolding of various popular revolutions in the seventeenth and eighteenth centuries, in which tax policies sparked the "establishment of representative institutions and the full flourishing of democracy."[205] Lack of faith in democracy is self-reinforcing in the tax rules, in that lack of faith in democracy facilitates socially-accepted tax evasion, which in turn further undermines faith in the system.[206]

Returning to Ian Shapiro's foundational elements of democracy,[207] tax rules designed to account for how democratic community members interact with their government have the potential to positively affect the culture of democracy and the institutions necessary to support a strong democracy. To nurture faith in democratic governance, the acts of paying taxes and navigating tax rules should be seen as opportunities for the government to justify itself to taxpayers, and to help taxpayers build faith in their government institutions. Conversely, tax rules fail to satisfy this element of the democracy criteria if those rules are constructed so that tax compliance and perceptions of the tax system undermine or diminish faith in government.

B. Supporting Participation in Democracy

In addition to helping build faith in democratic governance, tax law can support and promote democratic engagement and participation among citizens by way of how people interact with the tax system, how much revenue is raised, and how it is subsequently spent. Although the goal of increasing revenue is a preeminent concern in taxation generally, it has been an indeterminate criterion for shaping tax laws, perhaps because there seems to be justifiable room for democratic disagreement as to how much revenue should be raised. Libertarians have argued for minimal revenue, while egalitarians and advocates of social safety net programs have argued for robust revenue.[208] But debates between these opposing viewpoints too often disregard the central role of revenue in supporting democratic governance.

205. Isaac William Martin & Monica Prasad, *Taxes and Fiscal Sociology*, 40 ANN. REV. SOCIO. 331, 338 (2014) (surveying work by fiscal sociologists, including Tilly); *see also* SELIGMAN, *supra* note 20, at 382–83 (commenting that in the eighteenth century in Europe and in colonial North America, tax systems grew more sophisticated and more fair—distinguishing between taxpayers on ability to pay grounds—in places where the political process was or became more democratized).

206. *See* SAEZ & ZUCMAN, *supra* note 20, at 47–48.

207. *See supra* note 143 and accompanying text; SHAPIRO, THEORY, *supra* note 143, at 86–100.

208. *Compare* Epstein, *supra* note 115 (libertarian perspective advocating minimal government revenue), *with* KLEINBARD, *supra* note 50 (egalitarian perspective advocating redistributive taxing and, particularly, spending policies).

As Alexander Hamilton recognized in the Federalist No. 30, tax revenue is "the vital principle of the body politic . . . [which] enables it to perform its most essential functions."[209] The state must have taxing capacity—rules, systems, and infrastructure—sufficient to raise adequate revenue to sustain the government, and it also must spend money on the right things. Some government spending has obvious potential to enhance democracy: Hamilton cited national defense and funding for "plans of public good."[210] Conversely, some uses of revenue undermine democratic governance or thwart democratic decisions. In Syria recently, for example, a special "reconstruction" surtax was supposed to help rebuild homes destroyed during the ongoing civil war; instead, those funds were used to secure the authoritarian Assad government against popular sentiment.[211]

The importance of taxation to individual participation in democratic governance works in multiple ways, as elaborated in the following sections. First, taxation can foster a democratic "voice" by providing an outlet for taxpayers to express opinions and shape the government they are helping to fund.[212] Second, tax revenue can foster democratic capacity through investments in human capital that enable people to participate in democratic decision-making. Indeed, the creation and maintenance of a public education system was originally conceived as a way to foster at the founding of American democracy.[213]

209. THE FEDERALIST NO. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that a strong "general power of taxation" would be an important aspect of establishing a capable federal government).

210. *Id.* at 191. Even more directly, some spending supports foundational democratic institutions such as election administration and protection, operation of the judiciary to maintain democratic arrangements, and most directly, democratic bodies and government personnel overseen by democratically elected officials. The necessity of raising sufficient revenue to support the basic operations of democratic government has received substantial attention outside of the tax literature. *See, e.g.*, Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079 (2021) (detailing variations in election spending and funding sources across the United States and assessing the costs of elections, including cost disparities between states and funding sources for election activities).

211. *See* Bassiki & Mathiason, *supra* note 133.

212. SHEFFRIN, *supra* note 166, at 175.

213. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1081–84 (2019) (discussing Thomas Jefferson's emphasis on the importance of sufficient taxation to support public education, along with other Founders).

1. Democratic Voice

The concept of democratic "voice" is described as "the ability to express views or convey one's story" in the decision-making process.[214] Democratic voice allows "members of the public [to] communicate information about their experiences, needs, and preferences."[215] This kind of participation might "confer[] on the individual the dignity that comes with being a full member of the political community," which in itself is an important interest.[216] Taxation provides a forum for exercising voice, and tax revenue can shape institutions and norms that facilitate the exercise of voice in democracy.[217] Promoting democratic voice includes designing tax systems to give autonomy and expressive outlets to taxpayers.[218]

Paying taxes can provide community members with voice in the form of personal control over their government. Today, the federal tax system provides some limited mechanisms for taxpayers to decide what public goods they want to fund. Two examples are the deduction for charitable contributions and the option on Form 1040 to direct some tax dollars to fund presidential election campaigns.[219] In the charitable deduction example, a taxpayer who itemizes their deductions (typically a requirement for the charitable deduction)[220] can make the federal government a "co-investor" in a charitable enterprise to the extent of their

214. SHEFFRIN, *supra* note 166, at 4. Sheffrin stated that "voice is closely related to political accountability and the nature and structure of democratic systems." *Id.* at 168.

215. *See* KAY L. SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 2 (2012).

216. Kay L. Schlozman, Benjamin I. Page, Sidney Verba & Morris P. Fiorina, *Inequalities of Political Voice*, *in* INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN 19, 19 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

217. *Cf.* Hackney, *supra* note 88, at 367 (addressing "political voice inequality," a concept that combines voice, as discussed in this section, and non-domination, as discussed *infra* section III.B.3).

218. Sheffrin noted that there is an open question as to whether it is "the mere opportunity for voice that matters, or do individuals expect voice to have concrete effects on their well-being?" SHEFFRIN, *supra* note 166, at 189. Additionally, Sheffrin emphasized that voice includes allowing "opportunities to tailor public goods to individual desires." *Id.* Voice might also include funding aspects of government that directly engage the population in democratic acts, such as elections and public forums. The importance of funding basic institutions of democracy is discussed more at *supra* note 210 and accompanying text.

219. Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 389–90, 404–06 (1998).

220. In 2021, a non-itemized charitable deduction was permitted for up to $300 ($600 for a joint return) in connection with COVID-19 relief legislation enacted by Congress on a temporary basis. 26 U.S.C. § 170(p). A similar measure was in place from 1981 to 1985. ZELENAK, *supra* note 159, at 63 (discussing the Economic Recovery Tax Act of 1981).

marginal tax rate multiplied by the amount contributed.[221] Similarly, the Presidential Election Campaign Fund "check-off" program allows any taxpayer to earmark three dollars of their tax liability into that fund.[222] In both instances, the tax return provides *some* taxpayers with some autonomy and control over how the government spends money.

The federal tax system can empower people to be active participants in shaping their own situation, affecting how much tax liability they pay. Professor Saul Levmore described this as using taxes to "vote" on what the government does,[223] and Professor Zelenak made this ability an aspect of their defense of the fiscal citizenship benefits of tax returns.[224] For example, the taxes that affect the wealthiest people with the largest incomes result from actions that the taxpayer can decide to take, such as selling an asset—the capital gains tax is only imposed when the taxpayer takes an action that prompts "realization" of gain. This also makes transaction-based taxes easily avoidable. Similarly, the participatory opportunity of receiving a charitable contribution deduction is not available equally: people who take the standard deduction do not get the same opportunity to participate as generally higher income itemizers.[225] Professor Zelenak has also pointed out that the mass-return system provides a forum for protests and "cheating a little around the edges."[226] Zelenak viewed these outlets as a sort of "safety valve" that allow tax skeptics to express objections to taxation and the government in nonviolent—arguably democratically acceptable—ways.[227]

In the recent past, there were very direct links in many Southern states between taxation and voice: paying taxes was a prerequisite to participating in elections, deliberately breaking "congruence" between citizen preferences and representative actions for many citizens.[228] The poll taxes that blocked Black Americans from voting (until the Twenty-

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221. *See* ZELENAK, *supra* note 159, at 61–62; Levmore, *supra* note 219, at 405. For example, a taxpayer in the thirty-seven percent bracket who contributes $1,000 to a qualifying charity can take an itemized deduction that saves them $370 of tax liability, meaning that the government subsidizes $370 of the cost of the contribution, while they pay $630.

222. *See* 26 U.S.C. § 6096.

223. Levmore, *supra* note 219, at 405.

224. *See* ZELENAK, *supra* note 159, at 61–67.

225. Sara Barba & Jorge Castro, *Congress Can Help Reverse the Freefall of Charitable Donations*, BLOOMBERG TAX (Aug. 18, 2023), https://news.bloomberglaw.com/tax-insights-and-commentary/congress-can-help-reverse-the-freefall-of-charitable-donations [https://perma.cc/W26X-DY69].

226. ZELENAK, *supra* note 159, at 39.

227. *Id.* at 42–46.

228. Schön, *supra* note 18, at 239 (discussing "congruence" as the link between democratic decision-making and the "fiscal powers of the state"); Andrias & Sachs, *supra* note 8, at 571 (citing Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 287 (2014)).

fourth Amendment was ratified in 1964) provide an example of taxation that clearly undermined democratic governance by stymying participation and voice.[229] Poll taxes were a tool of racial domination; they undermined the voices of Black and poor Americans in the political process, disempowering them and contributing to their lack of capacity to engage further in politics.[230] But alas, tax scholarship was and has been largely silent about poll taxes, at least partly because the standard evaluative frameworks for tax law do not facilitate this kind of democracy-oriented analysis that considers tax paying an opportunity for democratic participation.[231]

The current U.S. federal tax code gives more voice and power—power to plan and to avoid—to the rich and keeps that power from the poor.[232] Hence, completing a tax return is more of a form of engagement for people who are otherwise already empowered than the disempowered.[233] Evaluating the tax rules and the act of paying taxes in terms of voice reveals that the distinct treatment is not just financial but goes to each taxpayer's role in democratic governance.

2. *Democratic Capacity*

A second element of taxation's potential to foster or undermine democratic participation is democratic capacity. As Professor Amy Gutmann described in emphasizing the importance of education to democratic governance, "children must be taught enough to participate intelligently as adults in the political processes that shape their society."[234] A democracy that ensures that its population is educated enough to engage as democratic citizens would look and feel very different than a democracy in which the population is wholly uneducated.[235] Public education both sets the stage for future democratic decision makers to become "ruler[s]" and is a product of how democratic decision makers

229. DAHL, *supra* note 47, at 8, 19; *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

230. *See supra* notes 79–80 and accompanying text.

231. Wallace, *supra* note 19, at 1238 n.31.

232. *See* Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1, 1–2 (1996).

233. *See id.*

234. AMY GUTMANN, DEMOCRATIC EDUCATION, at xi (rev. ed. 1999).

235. *See id.* at xii.

currently "rule."[236] The availability of revenue shapes the kind of democracy that the democratic community is capable of carrying out.[237]

In developing a democratic theory of education, Professor Gutmann was conscious of the public finance constraints on public education and the democratic implications of tax decisions.[238] Tax rules shape democratic education, which in turn determines how future generations will be prepared to serve the democratic community. Uneducated citizens in a modern economy may be better served to rely on representatives to shape complex rules necessary for any state to participate in the modern global economy. In contrast, highly educated citizens whose effective participation is fostered through state support might be able to make decisions directly or inform their choice of representatives through sophisticated deliberations amongst themselves, shaping each other's opinions and interests. In short, the capacity of citizens to engage democratically shapes democratic governance.[239]

There are numerous examples of specific ways that U.S. federal tax policy affects public education. Consider the home mortgage interest deduction,[240] which acts as a subsidy for owner-occupied housing and subsidizes local property tax revenues because as home prices increase, the amount of federal subsidy increases, reducing the annual cost of home ownership.[241] Tax-exempt bonds provide a financing tool for state and local units of government including for capital investments such as school buildings.[242] States are increasingly relying on special tax credits or other tax breaks to provide funding for private schools.[243] These rules are generally designed and implemented in ways that favor localities with robust property tax bases, providing benefits where schools are already

236. *Id.* at 3.

237. *See* Repetti, *Democracy, Taxes, and Wealth*, *supra* note 37, at 825 (describing wealth concentration as contributing to inequality, educational disadvantages, and "sociopolitical malaise").

238. GUTMANN, *supra* note 234, at 139–47.

239. *See generally* SCHLOZMAN ET AL., *supra* note 215; SIDNEY VERBA, KAY L. SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (1995) (showing and examining unequal participation between individuals and finding educational, resource-based, and cultural explanations).

240. 26 U.S.C. §§ 163(h)(2)(D), (h)(3).

241. *See* Wallace, *supra* note 21, at 1251–53 (estimating the federal subsidy differential between neighboring school districts in the Detroit, Michigan area, one of which had high property values, the other of which had low property values).

242. *See* 26 U.S.C. § 103. In the past, special financing provisions supported financing for school districts with various provisos. *See, e.g.*, *id.* § 54A (repealed 2017) (allowing tax-exempt financing for school investments in designated low-income areas); *id.* § 54F (allowing tax-exempt financing for school construction).

243. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 138–46 (2011) (addressing an Establishment Clause challenge to a state tax credit for private religious schools).

well funded, and in ways that do not target funding to localities that need additional resources beyond what they can muster without federal support.[244]

Although these tax rules contribute significantly to the current pathologies of public education in America, they have seldom been evaluated within the tax literature from the kind of democratic perspective proposed here. Tax policy can strengthen democratic governance if it is used to support educational opportunities and to ensure that all community members have access to sufficient education for them to effectively function as citizens. This is potentially a very demanding standard for tax policy: John Dewey emphasized that democracy should be seen as an ethic, with democratic citizens encouraged "to get rid of the habit of thinking of democracy as something institutional and external and to acquire the habit of treating it as a way of personal life is to realize that democracy is a moral ideal."[245] Instilling this type of democratic capacity in citizens is no small task.[246]

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The discussion in the preceding sections highlights that the interaction between taxpayer-citizens and the government can be a fragile and important part of how the democratic community views its government; therefore, the tax rules can deeply affect the vitality of the democracy. Effective participation requires that citizens have capacity to participate, and that they have outlets to exercise voice. Democratic voice is focused on opportunities and mechanisms to participate in governance that are facilitated through tax rules and tax compliance obligations; democratic capacity as described here is focused on education.[247] These elements of participation can be bolstered through commitments to education and through governing institutions and mechanisms that promote

244. One example is setting bond limits based on leverage as compared to assessed property values. *See* Wallace, *supra* note 21, at 1251–53.

245. JOHN DEWEY, *Creative Democracy—The Task Before Us*, *in* 14 JOHN DEWEY THE LATER WORKS, 1925–1953, at 224, 228 (Jo Ann Boydston ed., 1998).

246. Different versions of democracy may be more or less demanding of citizens' democratic capacities—for example, a limited representative democracy calls on citizens for less democratic engagement than a deliberative democracy where all citizens are directly involved in decision-making. These distinctions, and the applicability of different elements of the democracy criteria to in different models of democracy, are discussed further *infra* section III.A.

247. Steve Sheffrin brings two of these concepts together when discussing "informed voice" as a precept for developing a fair tax system. SHEFFRIN, *supra* note 166, at 219; *cf.* Kleiman, *supra* note 37, at 1890; Repetti, *Democracy and Opportunity*, *supra* note 37, at 1145 (discussing "equal voice" by reference to literature on political campaign finance reform).

transparency, accountability, and responsiveness.[248] These features are highly contextual, depending on the decision at hand and other features of the decision-making process, and they vary substantially under different theories of democracy.[249]

Tax policy that is attentive to capacity and voice—and that provides sufficient funding for capacity and mechanisms to foster democratic voice—can empower otherwise disengaged members of the community.[250] In considering these elements of participation, it is evident that a democratic government that supports effective participation in democratic decision-making would function differently than a would-be democracy that fails to provide such support.

C. *Shaping Political Economic Life*

There is a growing body of work by democracy scholars and political scientists that makes the descriptive case that economic inequality is corrosive to democracy.[251] In Professor Larry Bartels' analysis, while the affluent "have considerable clout" politically, the bottom one-third of income earners "have *no* apparent impact on the behavior of their elected officials."[252] That failure sets up a serious challenge: perhaps the best recourse to limit the outsized influence of economic elites is to limit their very existence by taking on inequality directly—not in the name of fairness, but in the name of democracy. Tax law and its central role in redistribution is, by this analysis, a site of contests that are relevant to democratic vibrancy.[253] Indeed, some legal scholars have made the case that economic inequality "may threaten the Constitution's democratic foundations," with the implication that there is a constitutional obligation to reverse extreme inequality.[254]

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248. *See supra* note 210 and accompanying text (describing funding for basic democratic institutions such as elections); Wallace, *Democracy Avoidance*, *supra* note 21, at 283–90 (discussing the importance of transparency, responsiveness, and other democratic values in tax legislating).

249. *See infra* section III.A (discussing different theoretical structures for democratic decision-making).

250. *See* Repetti, *Democracy, Taxes, and Wealth*, *supra* note 37, at 838–40.

251. *See* DAHL, *supra* note 195, at 173–78.

252. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 285 (1st ed. 2008). Bartels explained that elected politicians are captured by the donor class—people who give thousands of dollars or more to their campaigns. *See id.* at 285–86.

253. Levinson, *supra* note 3, at 140.

254. Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 670–71 (2014); *see also* SITARAMAN, *supra* note 29, at 255–57 (connecting diminishing marginal tax rates for wealthy individuals and corporations to increasing inequality). Indeed, there is convincing evidence that the "United States is now functioning as an oligarchy." Andrias & Sachs, *supra* note 8,

A concern for democracy-threatening maldistribution is elaborated through the democratic theory lens of "non-domination."[255] As defined and discussed below, non-domination can be advanced by disempowering those with too much control over the basic interests of others. Concerns for misallocation—spending resources on the wrong things—are explored through the democracy-focused lens of managing the economy for stability and inclusivity so that gains are widely shared and so that economic growth contributes to democratic vibrancy. This stands in contrast to the conventional wisdom that taxation should be used to manage the economy for growth and otherwise should seek minimal interference.

1. Non-Domination

Extracting resources via taxation is a way of limiting power—not just economic, but also political—from whomever the resources are taken.[256] Economic historian Sydney Ratner wrote, "[t]he economic basis for the creation and preservation of democracy is the distribution of wealth and income among the majority of the people in such a fashion that no elite can permanently dominate the community."[257] This description recognizes the potential link between the distribution of economic resources (which is, to be sure, the traditional focus of equity analysis by tax scholars) and the distribution of power in a society. Economic inequality matters not just because of the effects on the individuals with fewer economic resources, but also because of the potential effects on the capacity of the polity to pursue the common good.

With these sorts of concerns in mind, various democratic theorists have made non-domination a central concern in their work. Non-domination is related to—but distinct from—legal equality or economic equity.[258] A

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at 571. Andrias and Sachs quote Jeffrey Winters' evaluation: "regardless of the other ways in which political power might be equal—such as one-person-one-vote or an equal right to speak or participate—yawning differences in material power create enormous inequalities in political influence and account for key political outcomes won by oligarchs." *Id.* (quoting JEFFREY A. WINTERS, OLIGARCHY 214 (2011)). They go on to note that "whether best described as an oligarchy or not, the lack of government responsiveness to the views and desires of the vast majority of citizens is a serious problem for a democratic republic." *Id.*

255. Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L.J. 293, 307–08 (2012) [hereinafter Shapiro, *On Non-Domination*].

256. Avi-Yonah, *supra* note 10, at 1238–48; *cf.* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 18–19 (1983); Glogower, *supra* note 37, at 1445–46.

257. RATNER, *supra* note 86, at 22.

258. *E.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 232 (1821) (discussing the "*equal right*, that every man hath, *to his natural freedom*, without being subjected to the will or authority of any

concern for domination goes further than equality in that domination could be carried out by any participants in a decision-making process, even if they are operating in some context that purports to impose equality among participants (e.g., one person, one vote).[259]

There is debate among democratic theorists about how to define domination. Professor Phillip Pettit described a concept of domination that exists when one agent has "power of interference on an arbitrary basis" over another.[260] Ian Shapiro diagnosed Pettit's definition of domination as too broad, arguing that the *type* of potential interference is relevant.[261] According to Shapiro, domination exists when other people have power over an individual's access to the resources that are needed to survive and wield that power in ways that are harmful to the individual.[262] In this approach, the resources that matter for non-domination purposes are what Shapiro called "basic interests": whatever an individual needs to survive in their environment and economy, including shelter, food, health care, and education.[263]

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other man" (emphasis in original)); JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927) (describing democratic liberalism as encapsulating legal equality of individuals); ADAM PRZEWORSKI, CAPITALISM AND SOCIAL DEMOCRACY 218 (1985) (describing democracy as a system for aggregating preferences in which "as citizens individuals are weighted equally"); SCHLOZMAN ET AL., *supra* note 215 (focusing on unequal participation via organizations); VERBA ET AL., *supra* note 239 (showing and examining unequal participation as between individuals).

259. WALZER, *supra* note 256; IAN SHAPIRO, POLITICS AGAINST DOMINATION 172, 230 n.42 (2016) [hereinafter SHAPIRO, POLITICS]; *see* Shapiro, *On Non-Domination*, *supra* note 255, at 335 (comparing alternative conceptions of non-domination proposed by various democratic theorists).

260. PHILLIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51–52 (David Miller & Alan Ryan eds., 1997) (describing "freedom as non-domination" as part of their defense of civic republicanism).

261. It follows from Pettit's conception of domination that essentially all democratic decisions should be fully contingent and subject to change. *See* Shapiro, *On Non-Domination*, *supra* note 255, at 326–28. Thus, for example, Shapiro might expect that Pettit would embrace the persistent attacks over the last decade on the individual mandate and premium tax credit provisions of the Affordable Care Act, which pitted activists concerned about the principal of being "forced" to purchase health care against would-be beneficiaries of the law who were able to procure potentially life-saving care because of these provisions. *Id.* In Pettit's construct, the requirement to buy care might constitute arbitrary exertion of power and so should remain subject to democratic reconsideration; in Shapiro's, the people whose basic interests are threatened (i.e., beneficiary-recipients of the health care) would be at risk for domination, but those potentially required to pay more money for (affordable, subsidized) insurance would not be. *Id.* Although Shapiro appreciated concerns about arbitrary exertions of power, in Shapiro's evaluation, domination only exists for a group whose basic interests would be threatened by revisiting an issue at the hands of another group with no basic interests at stake. SHAPIRO, JUSTICE, *supra* note 142, at 235–236.

262. Shapiro, *On Non-Domination*, *supra* note 255, at 294, 308 (summarizing their focus of non-domination on "control [of] resources that you need to vindicate your basic interests" as "power-based resourcism").

263. SHAPIRO, JUSTICE, supra note 142, at 85, 236. This non-domination concern has the potential to resonate across a variety of political commitments: it is a concern that can be shared by staunch libertarians, democratic socialists, and people in between.

Domination, in either conception, is only possible where there is power to be wielded. In the democratic governing context, power is channeled through collective government, and lawmaking and policymaking are centrally about how to exercise the government's powers.[264] This combination means that domination should be a key concern in lawmaking and the operation of government. In order for inclusive decision-making institutions to yield democratically legitimate results where important issues are at stake, none of the participants should have outsized influence on those results to the detriment of other participants.[265]

Michael Walzer described a concept of domination consistent with this in their contextual theory of justice, in which Walzer focused on limiting domination across different social spheres.[266] Walzer contemplates, for example, that economic power accrued by an individual might affect a purportedly democratic decision-making process, even if financial resources were not directly brought to bear on a political process.[267] Thus, non-domination requires attentiveness to the conditions of decision-making on an ongoing basis and may be more demanding than simple equality.[268] Some scholars have recently connected tax policy proposals addressing inequality to Walzer's theory and to empirical work on the effects of inequality on political power.[269]

To advance the goal of strengthening democratic governance, tax rules should be shaped to promote non-domination in democratic decision-making. A focus on non-domination as a democratic concern in taxation dovetails with recent scholarship in other areas of public law that have looked to tax to help remedy structural inequality. For example, Professors Kate Andrias and Benjamin I. Sachs discussed a host of ways that tax rules might better shape "countervailing power."[270] But the sorts of policies they recommend are not consistent with the standard tax

264. *Id.* at 47–48; Shapiro, *On Non-Domination*, *supra* note 255, at 313. In policymaking and government action, the entire decision-making process is about the exercise of power, so the issue of how to "manage power relations" is inescapable in governance. *Id.*

265. *See supra* notes 258–260 and accompanying text (discussing variations of non-domination proposed by different political philosophers focused on democracy); *cf.* WALZER, *supra* note 256, at 19 ("[N]o citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good.").

266. WALZER, *supra* note 256, at 19, 122.

267. *Id.*; Repetti, *Democracy and Opportunity*, *supra* note 37, at 1161 (exploring the implications of Walzer's argument).

268. WALZER, *supra* note 256, at 122.

269. Glogower, *supra* note 37, at 1445–46; Avi-Yonah, *supra* note 10, at 1238–48; Repetti, *Democracy, Taxes, and Wealth*, *supra* note 37, at 840–49 (summarizing research on concentrations of wealth and democratic effectiveness).

270. Andrias & Sachs, *supra* note 8, at 599–600, 617.

principles of equity and efficiency.[271] A non-domination lens on tax policy opens up other avenues of tax policies that might not promote equity in the traditional sense, but that can help orient tax policy analysis to consider the democracy-threatening concerns that Andrias and Sachs raised, and their work is part of a growing body of non-tax scholarship addressing power dynamics.[272] As Daryl Levinson summarized, "every law and policy that affects distribution of wealth or the costs of mobilizing collective action at least potentially serves to redistribute political power."[273]

Tax rules that are attentive to domination can be designed to mitigate the extent to which economic power is accrued and can be focused on specific ways to undercut further concentrated control of policymaking.[274] In this way, using tax laws to combat domination can help to "shape the terms" of democratic interactions without necessarily "determining the course."[275] Extending this work beyond the confines of democratic theory and beyond the limited perspective of standard tax equity analysis would allow tax to more fully engage with the democratic concerns to which the tax system might helpfully respond. This lens is considered in further detail in Part III with regard to recent debates on taxing wealth in the United States.

2. *Managing the Economy for Democratic Vitality*

While domination, described above, focuses on who actually exercises power in the political process, using tax to manage the economy democratically recognizes that the tax system reaches to other structural elements of society.[276] In broad strokes, the tax system can determine how capital is allocated, who ends up with what, and how participants in

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271. *See id.* They would, for example, reorient rules that prescribe activities tax-exempt organizations can engage in, change the tax treatment to employers for time employees spend on civic engagement, and provide tax incentives for civic organizations promoting particular kinds of participation. *Id.*; *cf.* Hackney, *supra* note 37, at 322 (introducing "equity in a governance sense" as an alternative to the traditional criteria).

272. Andrias & Sachs, *supra* note 8, at 551; *see also* Kendall Thomas, *Racial Justice: Moral or Political?*, 17 NAT'L BLACK L.J. 222, 232–33 (2004) (proposing to establish and support "oppositional counterpublics" to counterbalance perennial "winners").

273. Levinson, *supra* note 3, at 138.

274. *Cf.* WALZER, *supra* note 256, at 19 (describing "complex equality" as entailing that "no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other social good").

275. SHAPIRO, JUSTICE, *supra* note 142, at 63.

276. *Cf.* RAHMAN, *supra* note 12, at 87.

economic life relate to one another.[277] Tax laws "affect the volume of employment, the distribution of economic resources among different occupations, and the total supply of factors entering into production,"[278] shaping almost every aspect of society.[279] Further, democratic vibrancy is profoundly impacted by the degree of economic equality or inequality across community members, even beyond power dynamics.[280] As Professor Dani Rodrik observed, "[i]n the advanced countries, dissatisfaction [with democratic governments] revolves around their inability to deliver effective economic policies for growth and inclusion."[281] However, most often in the tax law and policy literature, this economic management function of tax is converted into an imperative to use the tax system to promote macroeconomic growth, with little consideration for how that growth is distributed and the extent to which it is inclusive.[282]

Professor K. Sabeel Rahman, expressing concern about the state of American democracy, queried, "[h]ow [should] we structure [governance] to better promote values of freedom, equality, and dignity?"[283] To "realize democratic aspirations" requires looking beyond elections and legislatures to "a more diverse array of institutional structures and conditions."[284] Rahman highlighted a tax law from the early twentieth century that showed how taxes have been—and can be—used as tools of economic regulation with democratic undertones. In *Louis K. Liggett Co. v. Lee*,[285] the United States Supreme Court struck down a Florida "Anti-Chain Store Law," which consisted of taxes on operations with multiple locations. Justice Brandeis explained (in dissent) that the tax at issue dealt directly with the balance of power society and citizens' participation in government.[286] Brandeis explained that a tax that imposed a steep price

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277. *See* JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY (6th ed. 2019) (Part IV, titled "Taxation in Theory and Practice," discusses taxation as related to economic management, labor supply, savings, business activity, and other features of an economy with both allocative and distributional import). *See generally* Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685, 686 (1989).

278. RATNER, *supra* note 86, at 13.

279. *See* GRUBER, *supra* note 277.

280. *Cf.* RATNER, *supra* note 86, at 14; DAHL, *supra* note 195, at 173–79.

281. RODRIK, *supra* note 1, at 263–65.

282. *See* JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 8–9 (5th ed. 2017).

283. RAHMAN, *supra* note 12, at xi.

284. *Id.* at 14–15.

285. 288 U.S. 517 (1933).

286. *Id.* at 541; RAHMAN, *supra* note 12, at 93–94.

on chain stores was part of a long tradition of limitations on corporate activity that "were, in part, an expression of the desire for equality of opportunity."[287] In the absence of such limitations, corporate agglomerations of power were "sometimes able to dominate the state."[288] Brandeis saw that state tax policy had the potential to affect the course of political development.

Tax policy has generally been focused on economic issues—sometimes just economic growth, but also broader economic management. As the U.S. federal income tax took its modern form in the mid-twentieth century, it was shaped in large part by a powerful faction of tax policymakers who all agreed that tax manipulation surpassed government regulation, aggressive monetary policy, or public spending as a means of boosting economic growth.[289] But even as they were concerned with growth, they "argued that adjustments to the income tax code . . . offered an effective form of economic policy" more broadly understood.[290] In this period, the U.S. federal tax system became a vector for delivering social insurance, medical insurance, and wage supports.[291]

The example of Social Security is instructive here. The system relies on a payroll tax as a dedicated source of financing, which allows current payees to feel that they have a stake in the government's commitment to provide them with future benefits. The sense of "buy in" has shaped how Americans think about work and retirement.[292] President Roosevelt expressly tied the Social Security system to the nation's democratic commitments.[293] But payroll taxes have proven to be an area that gains comparatively little traction in tax law scholarship, perhaps because the standard criteria are not well suited to consider the democratic valence of an otherwise vanilla statute.[294]

A democratic perspective on taxation demands a new normative lens for evaluating tax laws and policies. Tax policy that has social goals or is oriented towards shaping economic growth may also have significance in terms of the democratic roles of taxpayers.

287. *Louis K. Liggett Co.*, 288 U.S. at 549.

288. *Id.* at 565.

289. *Id.*

290. JULIAN E. ZELIZER, TAXING AMERICA: WILBUR D. MILLS, CONGRESS, AND THE STATE, 1945–1975, at 9 (1998).

291. *See id.* at 11–16 (focusing on Social Security); *id.* at 212–14 (focusing on Medicare).

292. *See id.* at 11–16; SIDNEY RATNER, JAMES H. SOLTOW & RICHARD SYLLA, THE EVOLUTION OF THE AMERICAN ECONOMY: GROWTH, WELFARE AND DECISION MAKING 517 (1979).

293. *See, e.g.*, Franklin D. Roosevelt, Radio Address on the Third Anniversary of the Social Security Act (Aug. 15, 1938) (tying the success of Social Security to democratic vibrancy).

294. *See* KLEINBARD, *supra* note 50, at 198–206 (noting that Social Security has been underappreciated, in part because tax scholars pay too little attention to spending policy).

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The democracy criteria described here incorporates various elements of democratic theory. These democracy criteria include—but should not be limited to—considering how tax laws can build faith in democracy, supporting participation in democratic decision-making, and designing tax policies to feature non-domination and shape economic and political relations to promote vibrant democracy. The margins of analysis laid out above are not meant to be comprehensive, but provide a view on several ways in which tax policy has democratic valence that has generally not been incorporated into tax analysis. The considerations described above should accompany the standard frameworks that are familiar in tax analysis. Sometimes the democracy criteria might strengthen normative claims about the equity, efficiency, or administrability of a proposal; sometimes the democracy criteria might be in tension with some of those standard types of analyses. Sometimes the democracy criteria will show internal tensions—inclusive growth might conflict with empowerment through compliance. The discussion here is meant to prompt this type of democratically-oriented analysis, not predetermine the results of debates. The next Part provides a sample of how the democracy criteria might come to bear on one contemporary tax policy issue.

III. EXPLORING THE DEMOCRACY CRITERIA

What might a democratic perspective mean for substantive tax policy? This Part sketches how the democratic considerations in tax policy discussed above might be applied. First, section III.A lays out various approaches to democratic governance and considers briefly how tax law might be used to support these different versions of democracy. Second, section III.B applies the democracy criteria to the recent and ongoing debates about wealth taxation, showing that these criteria give a normative foundation to some of the political rhetoric in those debates, and can illuminate important considerations that should shape tax policy design. Throughout, this discussion considers further implications of placing the democracy criteria alongside equity, efficiency, and administrability.

A. Different Models of Democracy

There are many theoretical and practical answers to the basic questions of who makes decisions in a democracy and how.[295] This section briefly

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295. *See generally* CUNNINGHAM, *supra* note 150, at 13, 25, 27, 29, 123–33 (synthesizing and critiquing the various alternative models of democracy).

relates the democracy criteria to various models of democracy. It is meant to offer clarity for scholars considering the democracy criteria for taxation by describing some basic tenets of democratic theory, and to provide a starting point for further consideration of democratic perspectives on taxation.

Consider some alternative visions of democracy. In the *competitive* or *agonistic* model of representative democracy, often associated with Joseph Schumpeter, democracy is defined by a limited conception of equal opportunity to vote, with the narrow focus of promoting competitive elections.[296] The democratic demands placed on the tax system in this type of democracy would be minimal. A poll tax would violate some precepts of the democracy criteria in that it would prevent participation.[297] Beyond that, the competitive or agnostic model might only require concern for adequate tax revenue to support civic institutions that ensure basic election integrity and provide every citizen with an opportunity to vote.[298]

Other models of democracy might demand more of the tax system. A *republican* model, which features representative governance with certain protected rights, would more fully implicate a version of non-domination concerns, with attention to how a politically powerful faction might wield power over others with less power.[299] The tax rules would have to be shaped to prevent any arbitrary exactions and, perhaps, to reduce factional power.[300] In contrast, a *participatory* model features institutions and practices to foster inclusion in democratic decision-making processes.[301] The democracy criteria might call for a tax system that can provide robust revenue to ensure effective participation in decision-making by each individual, or it might suggest using the reach of the tax system to facilitate participation in the taxes-as-ballots approach.[302]

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296. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269–83 (3d ed., 2008) (1942) (advancing a limited model of democracy with few demands on citizens or governing institutions).

297. *See supra* section II.B.

298. *See supra* notes 79–80 and accompanying text (discussing poll taxes as tools of voter suppression); Bassiki & Mathiason, *supra* note 133 (discussing funding for basic democratic institutions).

299. *See* PETTIT, *supra* note 260, at 51, 171–205; *see also* DAVID HELD, MODELS OF DEMOCRACY 29–55 (3d ed., 2006) (describing "classical republicanism" as generally concerned with equality (non-domination) in political matters).

300. *See* HELD, *supra* note 299.

301. BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (2004) (arguing that participation fosters legitimacy and yields benefits to the engaged population); *see* Levmore, *supra* note 219, at 387–88 (describing the use of tax returns to allow community members to "earmark a small amount of their tax payment for the cause of publicly financed presidential campaigns").

302. *See supra* notes 219–224, 226–234 and accompanying text.

Even more involved, a *deliberative* model of democracy focuses on creating conditions for members of the democratic community to "reason together to reach mutually acceptable decisions."[303] In this model, the success of democracy is measured by the extent to which the democratic process works to improve decision outcomes and the character of the people involved in and subject to democratic decisions. This model would perhaps demand robust tax revenue focused on civic education and the establishment of a deliberative decision-making infrastructure to engage all participants.[304]

Finally, Robert Dahl described American democracy as a version of a *pluralist* or *polyarchy* model of democracy, characterized as "rule by the people," with various and sometimes competing centers of power.[305] The term "polyarchy" describes the sprawling variety of decision-making inputs that characterize modern self-identified democracies in which interest groups compete and collaborate to promote specific interests.[306] For example, the political inputs that produce U.S. tax policy include elected representatives, bureaucrats, interest groups, lobbyists, and citizens voting in direct democracy. The next section considers in more detail how the democracy criteria might illuminate a current debate in U.S. federal tax policy, applying the democracy criteria in our current version of pluralist democracy.

Of course, there are many other visions of democracy that theorists and others may favor; the democracy criteria for taxation may be adaptable to any model of democratic decision-making.[307]

B. Taxing Wealth

The democracy criteria can and should inform broad and wide-ranging debates in tax policy. Consider recent proposals to enact a federal wealth tax.[308] The debates on wealth taxation exhibit the deficiencies of the

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303. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (1996).

304. *See supra* notes 234–240 and accompanying text.

305. DAHL, *supra* note 47, at 106; *id.* at 313–15 (describing large modern democracies as having multiple levers of power).

306. *Id.* at 220–24.

307. *See infra* section II.A (reviewing six other leading models of democracy).

308. The most well-known proposals in recent years came from Senators Elizabeth Warren and Bernie Sanders. *See Tax on Extreme Wealth*, FRIENDS BERNIE SANDERS, https://berniesanders.com/issues/tax-extreme-wealth/ [https://perma.cc/HQ4G-4NSW] (proposing a progressive wealth tax on households with net worth over thirty-two million dollars, starting at a one percent rate and rising to eight percent for households with net worth in excess of ten billion dollars); *Ultra-Millionaire Tax*, WARREN SENATE, https://elizabethwarren.com/plans/ultra-millionaire-tax [https://perma.cc/4597-3ACH] (proposing a two-bracket wealth tax with a rate of two percent on household net worth over fifty million dollars and four percent on net worth over one billion dollars).

standard criteria. As in other tax law debates, significant work on wealth taxes has disregarded democratic considerations. For example, leading tax scholars David Shakow and Reed Shuldiner wrote an important, insightful wealth tax proposal,[309] introducing their extensive analysis as follows:

> [t]here are essentially two reasons for a careful consideration of a wealth tax. First, one might consider a wealth tax to be superior to both the current income tax and to widely considered alternative taxes, such as a consumption tax. Second, even if the wealth tax is, for one reason or another, an inferior tax, nevertheless, consideration of the wealth tax may provide useful insight on other taxes. In particular, the similarity between the wealth tax and the income tax sheds light on the income tax. For purposes of comparing the wealth tax with its alternatives, we adopt the standard framework for evaluating tax systems, and consider effects on equity, efficiency, and administrability.[310]

The authors then proceeded through a detailed analysis of the three standard criteria, in the traditional mold.[311] They paid no attention to governing context, faith in government, effectiveness of democratic decision-making, or power dynamics potentially facilitated by wealth. There are plenty of other examples that approach wealth tax analysis in similar fashion.[312]

As wealth inequality has continued to rise, and as democratic institutions in the United States have appeared to be vulnerable to failure, policymakers and scholars have focused more and more on democratic values as a consideration in wealth taxation. Professor Heinz Klug observed that failures of progressive taxation have resulted in "not only increasing inequality, but also an undermining of democracy."[313] Professor Jennifer Bird-Pollan noted that "there is reason to believe that concentrations of wealth make democracy less viable."[314] Earlier,

309. David Shakow & Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX L. REV. 499 (2000).

310. *Id.* at 500.

311. That is, efficiency, equity, and administrability. *Id.*; *see* Christians, *supra* note 16 and accompanying text.

312. *E.g.*, James Kwak, *Reducing Inequality with a Retrospective Tax on Capital*, 25 CORNELL J.L. & PUB. POL'Y 191 (2015) (evaluating wealth tax alternatives primarily in terms of efficiency and administrability, with no consideration of democratic values); Daniel Schaffa, *The Intergenerational Equity Case for a Wealth Tax*, 90 U. CIN. L. REV. 735, 736–38 (2022) (acknowledging "political inequality" concerns motivating some wealth tax proposals, but offering an alternative proposal motivated by an "intergenerational equity" concern that future generations in the United States will face a greater debt burden due to recent government borrowing).

313. Heinz Klug, *Democracy, Inequality, and the Need for a Social Solidarity Tax*, 31 S. CAL. REV. L. & SOC. JUST. 179, 181 (2022).

314. Jennifer Bird-Pollan, *Why Tax Wealth Transfers?: A Philosophical Analysis*, 57 B.C. L. REV. 859, 867 (2016).

Professor Deborah Schenk dismissed the possibility that a wealth tax could effectively "strip the wealthy of their political power" because the rates to accomplish this would be "politically unacceptable," but Schenk made a democratic argument that it is untenable for the wealthy not to contribute *something* to fund the government.[315] Still, these references to democratic concerns rarely move beyond surface-level considerations of what democracy means and how a wealth tax might affect democracy.[316]

Other scholars have been grasping for ways to more fully consider democratic values within debates on wealth taxation.[317] Professor Repetti mined the connections between concentrations of wealth on the vibrancy of democratic decision-making, making the case for a robust taxation of intergenerational wealth transfers.[318] While wealth inequality is well within the purview of traditional equity analysis, Repetti's scholarship forged new ground in proposing a distinctly democratic construction of equity.[319] Repetti focused on "equal voice" for participants in democratic decision-making, arguing that "concentrations of wealth have a harmful impact on the effectiveness of democracies" because the wealthy have a disproportionate influence over their local communities and their elected officials.[320] Repetti also relied on empirical research showing that dynastic wealth exacerbates these inequalities.[321]

Professor Ari Glogower built on Repetti's work as well as economics and political science literature focused on the social and political harms of inequality. Glogower introduced to the tax literature a "relative economic power" justification for wealth taxation, which was grounded in Professor Walzer's concern about domination across social spheres.[322] Glogower connected "imbalances of economic power," including the power derived from the *possibility* of spending previously accrued wealth,

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315. Schenk, *supra* note 160, at 456 n.167, 468–70.

316. For another example, Professors Jason Oh and Eric Zolt remained "agnostic" as to whether a wealth tax should be motivated out of concern for democracy or due to other tax policy considerations, but they evaluated various design issues in a wealth tax and recognized that different normative commitments will lead to different design features. Jason S. Oh & Eric M. Zolt, *Wealth Tax Design: Lessons from Estate Tax Avoidance*, 74 TAX L. REV. 175, 179–80 (2021).

317. *See, e.g.*, Sugin, *supra* note 76, at 650–63 (critiquing economic fairness as inattentive to democratic empowerment); Cavanaugh, *supra* note 37, at 447–70 (taking a historical perspective, showing that the earliest democratic system of government, in early Athens, relied exclusively on the wealthiest members of society to fund the government).

318. Repetti, *Democracy, Taxes, and Wealth*, *supra* note 37.

319. *See supra* notes 89–94 and accompanying text; Repetti, *Democracy and Opportunity*, *supra* note 37, at 1160–69.

320. Repetti, *Democracy, Taxes, and Wealth*, *supra* note 37, at 840–48.

321. *Id.* at 849–50.

322. Glogower, *supra* note 37, at 1445–51.

with giving rise to "social dominance."[323] Glogower thus argued that concentrated wealth presents a challenge to democratic participation, and the wealthy should be subject to taxation because the power derived from wealth is untouched by an income tax.[324]

Still, the concepts of democracy that various wealth tax proposals are sometimes said to address remain underdeveloped.[325] The democracy criteria introduced here can inform both the wisdom of wealth taxation generally and specific design considerations in a wealth tax. They can also respond to some criticisms lobbed at wealth tax proposals and at particular sorts of democratic concerns, as discussed below.

1. Wealth Tax to Promote Faith in Democracy

A tax on wealth can help increase faith in democracy by showing that the tax system works and applies to all citizens, including the wealthiest. This involves communicative functions—for example, a wealth tax law would express shared commitments to those who see the current set of loopholes and optional taxes at the top end as problematic.[326] A new tax regime that counteracts the impression (and reality) that some of the wealthiest taxpayers get away without paying taxes could bolster faith in fair government. A wealth tax also can be designed to incorporate a display of government competence by giving the federal government an opportunity to show that it can take on the lawyer-accountant complex that has so effectively protected all high-end wealth from taxation in recent decades. Additionally, a wealth tax can improve perceptions of the distributional fairness of the tax system. These democracy-focused expressive points have largely been missing from academic wealth tax debates. There have been some undercurrents of these ideas in political rhetoric surrounding wealth taxes, and a group of law professors and

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323. *Id.* at 1428; *see* WALZER, *supra* note 256, at 122; *cf.* Repetti, *Democracy and Opportunity*, *supra* note 37, at 1161–62.

324. Glogower, *supra* note 37, at 1448–51.

325. *Cf.* Cavanaugh, *supra* note 37, at 423. Professor Cavanaugh critiqued Walter J. Blum and Harry Kalven's well-known critique of progressive taxation on democratic grounds. Cavanaugh noted that "[d]etailed assessment or definition of these democratic ideals is lacking." *Id.*

326. *Cf.* Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *When Billionaires Don't Pay Taxes, People "Lose Faith in Democracy*,*"* PROPUBLICA (Feb. 28, 2022, 5:00 AM) https://www.propublica.org/article/when-billionaires-dont-pay-taxes-people-lose-faith-in-democracy [https://perma.cc/K96A-WBCN] (interviewing United States Senator Ron Wyden regarding *ProPublica* reporting on tax avoidance and evasion by the wealthy).

economists made some of these points publicly in recent political debates concerning taxation of billionaires.[327]

2. Wealth Tax to Support Participation in Democracy

A wealth tax can promote participation in democratic governance in multiple ways. First, the proceeds of a wealth tax might be devoted to fostering democratic capacity through education—in fact, that is precisely what Senator Elizabeth Warren proposed with her "ultra-millionaires" wealth tax that would have funded universal preschool.[328] There is significant empirical evidence that this sort of investment in early childhood education results in gains in recipients' abilities to engage politically.

Second, a wealth tax might contribute to democratic voice by equalizing opportunities for empowerment. Whereas currently the ultra-wealthy can opt in and out of paying taxes based on the realization rule and other intricacies of the income tax and gift and estate tax regimes, a wealth tax would take away some of that optionality. In that case, the relationship of the ultra-wealthy to the federal tax code would be more like that of other taxpayers: tax compliance would be required, not discretionary, every year.

Finally, unlike some other tax law proposals, a wealth tax does not offer opportunities to facilitate direct participation through engagement with the tax system. Still, revenue from a wealth tax might be devoted to increased redistribution, which could provide voice for some who lack it due to lack of economic resources. People who are the beneficiaries of redistribution might use the proceeds to make political contributions that directly impact political processes, or they might be empowered in less tangible ways simply by having more resources at their disposal. Additionally, the revenue from a wealth tax could be devoted to institutions or ventures that facilitate voice.[329] Each of these measures

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327. Letter from Americans for Tax Fairness, 219 Economists & Law Professors Support the Billionaires Income Tax (Dec. 10, 2021), https://americansfortaxfairness.org/wp-content/uploads/2021-12-10-Release-219-Economists-Law-Professors-Urge-Congress-to-Include-%E2%80%98Billionaires-Income-Tax-In-BBBA.pdf [https://perma.cc/QHY3-7SDU] ("Letting billionaires opt out of their tax obligations also undermines perceptions of fairness, weakens the public's faith in the overall tax system, and erodes the public's confidence in government."). The author was a signatory of the letter. *Id.*

328. *Universal Child Care,* WARREN SENATE, (Feb. 19, 2019) https://elizabethwarren.com/plans/universal-child-care [https://perma.cc/42CG-JQEB].

329. *See supra* notes 270–272 and accompanying text.

could help to increase "congruence" between the policy preferences of the non-wealthy and the policy outcomes adopted by elected leaders.[330]

3. Wealth Tax to Advance Non-Domination

By reducing the economic power of the wealthy, a wealth tax could reduce actual or potential political spending by the wealthy, in turn reducing their political influence and the extent to which elected officials pay attention to them.[331] As Glogower has argued with his theory of relative economic power, significant power is derived from simply having wealth, even if nothing is actually done with it.[332] Further, to the extent that a wealth tax could be onerous enough to actually reduce high-end wealth inequality, it could positively affect economic opportunity and intergenerational mobility, allowing more opportunities for the non-wealthy.[333]

* * *

All of these democracy criteria arguments in favor of wealth taxation can be expanded and debated. Some will be convinced by one democracy-oriented consideration, but not by others. Consider the following example of a democracy-skeptical reaction to one of the non-domination arguments for wealth taxation. Professors Joseph Bankman and David Weisbach advanced an argument in favor of a pure consumption tax that is built, in part, on their claim that wealth alone provides little political power; rather, they argued, consumption is the means by which power is exercised.[334] Thus, in their view, wealth is merely future consumption—and does not, independent of that future consumption, produce "security, prestige, and power."[335]

Although I disagree with that view, it highlights the importance of considering a wide democratic perspective on taxation. Bankman and Weisbach are resolved to be unconvinced by Professor Glogower's and Professor Avi-Yonah's concerns about domination resulting from

330. *See* Schön, *supra* note 18.

331. *See* BARTELS, *supra* note 252, at 283; Glogower, *supra* note 37, at 1445. *But see* Schenk, *supra* note 160, at 456–57 n.167 (expressing that in order to equalize political power, taxes on wealth would have to be so high as to be politically infeasible).

332. Glogower, *supra* note 37, at 1448–51.

333. *Cf.* Repetti, *Democracy, Taxes, and Wealth*, *supra* note 37, at 840–50.

334. Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413, 1421, 1448–50 (2006).

335. *Id.* at 1448–51.

wealth.[336] But, as this Article asserts in Part II, there is more to the democracy criteria for taxation than non-domination. Bankman and Weisbach (or their audience) might be convinced as to the communicative value of enacting a law that taxes wealth.[337] Or they might see that revenue from a wealth tax can support democratic capacity (and can use that revenue to invest in education now, which is not possible in their wait-for-consumption approach).[338] Or they might accept that, despite their assertion "that power and prestige [are] likely [to] come more from labor than from savings,"[339] there are nonetheless valid democratic motivations for reshaping society by converting accumulations of private wealth to public goods, aside from concerns about domination.[340]

The democracy criteria can provide explicit and deliberate ways to connect tax with democracy. The criteria provide a set of considerations for interrogating tax policy distinct from the standard analytical approaches. And they provide a toolset for tax scholars to engage with scholars from other fields who have proposed tax rules to address problems they have detected in their own fields, or to allow tax scholars and policymakers to be responsive to democratic concerns by generating tax policy proposals, as shown in the examples above.[341]

CONCLUSION

During the 2016 presidential campaign, then-candidate Donald Trump asserted that not paying federal income tax "makes me smart."[342] Economists Emmanuel Saez and Gabriel Zucman reacted that this statement showed that "[t]he country's tax system—the most important institution of any democratic society—had failed."[343] Through the lens of the standard criteria for evaluating tax policy, the failure would seem to be one of distribution and administrability. Those are significant problems, to be sure, but they provide an incomplete description of the failure. Trump's actions and words mark a *democratic* failure because an extremely powerful person was flaunting his ability to avoid contributing

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336. *See supra* note 269 and accompanying text (discussing Glogower and Avi-Yonah's embrace of Walzer's "spheres of justice" argument).

337. *See supra* section II.A.1.

338. *See supra* section II.B.2.

339. Bankman & Weisbach, *supra* note 334, at 1450.

340. *See supra* section II.C.

341. *See supra* Introduction (discussing legal scholars in other fields who have looked to tax for solutions bearing on the health of democracy).

342. SAEZ & ZUCMAN, *supra* note 20, at vii.

343. *Id.* at viii.

to the public good, and because the tax law and political environment somehow made that skirting of a duty of citizenship apparently laudable to a substantial portion of the population. The failure is problematic in terms of communicative elements of the tax law and domination.

A few generations ago, Professor Stanley Surrey,[344] one of the leading tax commentators in the country,[345] celebrated the state of U.S. federal tax policy in the pages of a leading law review.[346] The progressive income tax in place at the time, viewed through the lenses of equity, efficiency, and administrability, represented "the most appropriate method of raising governmental revenue" in their analysis.[347] But Surrey expressed concern about how Congress might lead tax policy astray and urged sensitivity to "public attitudes."[348] Surrey went on to offer what is now recognizable as a public choice critique of certain provisions of the then-recent overhaul of the tax law.[349] They identified that a few powerful, well-organized interest groups used the legislative process to insert several "special tax provisions" into the 1954 Internal Revenue Act.[350] These consisted of low-salience, high-value handouts that barely registered with the diffuse, distracted public.[351]

In short, in the late 1950s, there was critical agreement that the U.S. tax system was exemplary and that the primary threat to it would be the operation of democratic interest group politics, which risked undermining it. While the tax system was at the mercy of democratic institutions, the effects of taxation on democracy were—and would remain for a generation or more of tax scholars—an afterthought at most. Nonetheless, viewing tax from a democratic perspective, it is evident that U.S. tax policy has molded the structure of American democracy.[352] It is also evident that participants shaping some of these tax policies have democracy-oriented concerns, which have sometimes been downplayed in favor of the standard criteria and which might be sharpened and honed

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344. Surrey served in the U.S. Department of Treasury for nearly twenty years, including as the Assistant Secretary of Treasury for Tax Policy from 1961 to 1968 and was a member of the faculty at University of California and Harvard Law School from the late 1940s to the early 1980s.

345. *See generally* George K. Yin, *"Who Speaks for Tax Equity and Tax Fairness?": Stanley Surrey and the Tax Legislative Process*, 39 VA. TAX REV. 39 (2019).

346. Stanley S. Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1145 (1957).

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* at 1149–80; *see also* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 144 (1965).

351. *Id.*

352. *See* Wallace, *supra* note 21; EINHORN, *supra* note 80.

more effectively by considering the democracy criteria laid out above. In that 1950s context—in which the terms for modern tax scholarship were set—this lack of attention to democracy may have seemed natural. From that time onward, as the U.S. federal income tax subsequently became more sophisticated and became a focus in academia, the world around it was one in which democracy was spreading to new nations and existing democracies were thriving. A liberal-democratic consensus agreed that modern welfare states required progressive, broad-based taxation, with the key questions being matters of degree, technical design, and administrative considerations.

The world today—with autocracies on the rise, climate change threatening humanity, systemic racial inequity, increasing distributional inequality, and persistent power imbalances manifested in myriad laws and policies, all of which have undermined attempts at democratizing governance—demands that tax policies should be conceived with a broad focus on establishing and sustaining effective democracy.

This Article makes the case that the standard analytical tools proffered by the normative criteria of equity, efficiency, and administrability are insufficient to confront the challenges to democratic political economy that currently face the country and world. Effective taxation should be approached as fundamental to a healthy democracy. Tax laws and policies in the United States are not shaped by courts adhering to constitutional constraints, but rather by lawyers and economists who advise policymakers on how the law will work and its effects. Taxation should be analyzed, designed, and implemented to strengthen democratic governance. Using the lens of democracy proposed here can make that happen.

Like the familiar, but highly-contested, standard criteria of equity, efficiency, and administrability, the democracy criteria should be subject to interpretation and debate; democracy is complex and multifaceted, and scholars and policymakers will disagree on how democratic values and norms should be advanced by tax policy and how tax policy should be used to shape democratic institutions and practices. In staking out the importance of a democratic perspective on taxation, this Article advances one version of how the democracy criteria might be conceptualized, which is intended to be a starting point for a more deliberately democratic discourse on tax law and policy.