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TAX POLICY AND OUR DEMOCRACY

Clinton G. Wallace*

OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES. By *Anthony C. Infanti*. Cambridge: The MIT Press. 2018. Pp. xi, 159. \$39.

RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973. By *Camille Walsh*. Chapel Hill: The University of North Carolina Press. 2018. Pp. xii, 176. Cloth, \$90; paper, \$29.95.

INTRODUCTION

In her new book, *Racial Taxation: Schools, Segregation, and Taxpayer Citizenship, 1869–1973*, Camille Walsh¹ describes the following episode. In the early twentieth century, the citizens of Covington County, Mississippi (population in 1920: 14,869²) had established two school districts, one for “colored” (i.e., black) students and the other for white students.³ The black schools were partially funded by a 10-mill tax on land in the black district,⁴ and all of the landowners in the district were black.⁵ The white district, which was much larger geographically, was also partially funded by a 10-mill tax on land in that district.⁶ The separate districts with equivalent 10-mill tax rates established some semblance of adherence to the separate-but-equal doctrine of the day. But there was a clear inequity, even viewed through that discrimination-permissive lens: the white district covered and included al-

* Assistant Professor of Law, University of South Carolina School of Law. Thanks to Anthony Infanti and Camille Walsh for writing these fascinating and important books. For helpful feedback and discussions, thanks to Alice Abreu, Derek Black, Stephen Daly, Tessa Davis, Ari Glogower, Hayes Holderness, Ariel Kleiman, Shelly Layser, participants at the 2019 Junior Tax Scholars Workshop, and the University of Minnesota research workshop at the 2019 International Conference on Taxpayer Rights. Thanks to Jeff Blaylock, Lauren Egan, Dakota Knehans, and Harris Sinsley for excellent research assistance. All errors are my own.

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2. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, POPULATION 1920: NUMBER AND DISTRIBUTION OF INHABITANTS 113 (1921).

3. Walsh, pp. 49–50 (citing *Bryant v. Barnes*, 106 So. 113 (Miss. 1925)).

4. That is, for every \$1,000 of assessed property value, a tax of \$10 was imposed.

5. *Bryant v. Barnes*, 106 So. 113, 114 (Miss. 1925).

6. *Id.*

most all of the black district.⁷ The law required black landowners in the overlapping area to pay two separate 10-mill taxes on their property—one to fund the schools that their children attended in the black district, and one to fund the schools that their children were prohibited from attending in the white district.⁸ At the same time, no white landowner was required to pay tax to the black district.⁹ Black landowners were being double taxed, white landowners taxed once.

The prospect of “double taxation” is generally perturbing to tax policy-makers and analysts, although the concept is murky: any double tax is the economic equivalent of a single tax at double the rate.¹⁰ The prospect of double taxing where some are single taxed is thought to offend each of the traditional criteria for evaluating tax policy—equity, efficiency, and administrability.¹¹ Double taxation is inequitable because it can result in similar things (taxpayers, taxable items) being taxed differently; it is inefficient because different tax treatment of similar things can alter behavior in unfavorable ways; and it can cause administrative challenges by increasing the enforcement burden on the government.¹²

Given that double taxation is so widely treated as problematic for equitable, efficient, and administrable taxation, what was the tax policy analysis of the double taxation imposed on black property owners in Covington County, Mississippi? Neither courts nor policymakers (so far as I can determine) took on the problem of double taxation in and of itself. And, perhaps not surprisingly given the time and place, courts rejected claims that the double taxation policy violated the Equal Protection Clause of the U.S. Con-

7. *Id.*

8. *Id.*

9. *Id.*

10. The term “double taxation,” though frequently used in tax policy debates, is ill-defined. It can refer to multiple taxation of the same tax base by different tax authorities or by the same tax authority without allowing for a deduction. Sometimes, more colloquially, it is used to refer to taxation of different but similar tax bases at different points in time.

11. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. 5, ch. II (R.H. Campbell et al. eds., Liberty Classics 1981) (1776) (providing an early articulation of these criteria in his four “maxims” of taxation: equality, economy, certainty, and convenience).

12. Nonetheless, double taxation arises in a variety of contexts. For example, if a state tax results in the potential for double taxation of out-of-state persons, while in-state persons engaging in the same activity are taxed only once, the state tax may be deemed unconstitutional under Dormant Commerce Clause doctrine. See, e.g., *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787 (2015) (describing the “internal consistency” test that polices hypothetical double taxation). In similar fashion, international tax rules focus on the concern that individuals and multinational corporations with cross-border activities could be subject to taxation by multiple countries. Most of the nearly seventy bilateral tax treaties that the United States has entered into are designed, first and foremost, to prevent residents of each country from being subject to double taxation on income earned in the other country. E.g., *Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital*, Fr.-U.S., Aug. 31, 1994, S. TREATY DOC. NO. 103-32 (1994).

stitution. The racist double taxation regime was upheld by the Mississippi Supreme Court.¹³

Nearly 100 years later, Fourteenth Amendment doctrine has advanced to recognize that explicitly racist government policies are unacceptable. Because the district lines in Covington County were explicitly drawn to segregate black students, and race is not a justifiable distinction under the Equal Protection Clause, the same school funding scheme, enacted today, would clearly be unconstitutional.

But the tax policy world has not experienced even a modest degree of evolution—for example, it does not incorporate a no-racism standard.¹⁴ Tax equity analysis is almost exclusively focused on economic distribution—who pays how much and who gets how much.¹⁵ In fact, in contrast to other federal government agencies that oversee social policy, the IRS does not even track the effects of tax policy on different racial groups.¹⁶ Rather, as Anthony Infanti¹⁷ describes in his new book, *Our Selfish Tax Laws: Toward Tax Reform that Mirrors Our Better Selves*, analyzing tax policy along these margins has been relegated outside of the “mainstream” of tax policy analysis (Infanti, pp. 13–14, 39).

Consider a double taxation school funding scheme written in a “race-neutral” way—that is, a scheme that did not violate the Fourteenth Amendment¹⁸ but that nonetheless resulted in most black people paying twice the rate of most white people. That sort of purported race neutrality with vastly different racialized effects, in fact, describes property tax structures across many U.S. states today. Further, as was the case in Covington County and across Jim Crow America, black taxpayers are often condemned to schools significantly worse than the schools for white taxpayers.

13. *Bryant*, 106 So. at 116.

14. The closest we have come is the Supreme Court’s decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), sustaining the IRS’s denial of tax exemption due to racially discriminatory admissions policies that were found to violate “public policy.” This decision has rarely been applied subsequently. See Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 662 (2016).

15. See Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191 (2008); Sugin, *supra* note 14, at 655–56 (describing equity as primarily concerned with “economic fairness”). There are various alternative frameworks for how to evaluate tax equity through this economic lens. See generally Allison Christians, *Introduction to Tax Policy Theory*, SSRN (May 29, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186791 [<https://perma.cc/EXR5-QEV8>] (describing the normative foundations of tax policy as equity, efficiency, and administrative capacity, and dividing equity into benefits theory and ability to pay).

16. Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. (forthcoming).

17. Anthony Infanti is the Christopher C. Walthour, Sr. Professor of Law, University of Pittsburgh School of Law.

18. See *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (holding that de facto segregation across district lines is acceptable even though de jure segregation violates the Fourteenth Amendment).

Here's one example: In the Eastpointe, Michigan school district, a few miles northeast of Detroit, 72% of the students are black,¹⁹ and the schools are funded by a property tax at a rate of around 67 mills.²⁰ In Birmingham, about 20 miles to the west, 78% of students are white, and the tax rate is 27 mills.²¹ The Eastpointe rate is 2.4 times the Birmingham rate—how different are residents of Eastpointe from the residents of the black district in Covington County in the 1920s? Modern tax literature has not critiqued this sort of rate differential, perhaps because the rates are set by different localities. The result of the double taxation is counterintuitive, though: the Eastpointe schools spend \$10,099 per student and the average teacher salary is \$48,000 per year; just 71% of students graduate, 24% have satisfactory scores on reading proficiency exams, and 12% have satisfactory scores in math.²² In Birmingham, the respective numbers are \$16,195 per student, over \$69,000 per teacher, a graduation rate of 96%, and 76% proficiency in reading along with 68% proficiency in math.²³

These sorts of disparities in tax rates, funding levels, and devastatingly disparate educational outcomes have been litigated under the Equal Protection Clause, but to no avail.²⁴ Although intentional discrimination, referred

19. *Students at East Detroit Public Schools*, NICHE (2019), <https://www.niche.com/k12/d/east-detroit-public-schools-mi/students/> [https://perma.cc/YDP3-GR6Y] (reporting, additionally, that 16.9% of students are white, 7.2% of students are multiracial, 2.1% are Asian, 1% are Hispanic, and 0.9% are Native American). Note that until a recent rebranding as Eastpointe, the school district was known as East Detroit. Lori Higgins, *East Detroit Public Schools Gets a Name Change*, DETROIT FREE PRESS (May 24, 2017, 4:59 PM), <https://www.freep.com/story/news/2017/05/24/east-detroit-public-schools-name-change/343286001/> [https://perma.cc/EH7W-QUY3].

20. MICH. DEP'T OF TREASURY, 2018 TOTAL PROPERTY TAX RATES IN MICHIGAN 100 (2019), https://www.michigan.gov/documents/taxes/2018_TOTAL_RATES_-_report_648639_7.pdf [https://perma.cc/Z9HE-JGXX]. In Michigan, assessed value is limited to no more than 50% of fair market value. MICH. COMP. LAWS § 211.27a(1) (Supp. 2019). Thus, if a person purchases a home in Eastpointe for \$100,000, the annual property tax is around \$3,350 (calculated as 67 mills on the \$50,000 assessed value).

21. MICH. DEP'T OF TREASURY, *supra* note 20, at 126; *Students at Birmingham Public Schools*, NICHE (2019), <https://www.niche.com/k12/d/birmingham-public-schools-mi/students/> [https://perma.cc/DK4H-WNZZ] (reporting, additionally, that 11.8% of students are black, 4% are Asian, 3.3% are multiracial, 2.7% are Hispanic, and 0.1% are Pacific Islander).

22. *East Detroit Public Schools*, NICHE (2019), <https://www.niche.com/k12/d/east-detroit-public-schools-mi/> [https://perma.cc/EZ8R-4CEF].

23. *Birmingham Public Schools*, NICHE (2019), <https://www.niche.com/k12/d/birmingham-public-schools-mi/> [https://perma.cc/A2B6-UPUB].

24. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that economically disadvantaged students are not a "suspect class"). In some states, litigants have prevailed using state constitutional claims. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (challenging successfully under the state equal protection clause, following two more opinions from the California Supreme Court, a funding scheme that allowed Beverly Hills to tax at a rate of 2.4% yielding \$1,232 per student, compared to 5.48% yielding \$577 per student for Baldwin Park); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989) (stating that, in Texas from 1985–1986, the 100 poorest school districts had a tax rate that was nearly double the tax rate for the 100 wealthiest districts, yet the poor districts generated less than half the

to as “disparate treatment,” is clearly prohibited under the Equal Protection Clause and thus rarely arises in tax policy, “disparate impact” school financing schemes that are “facially neutral practices with discriminatory effects”²⁵ do not violate equal protection and have proliferated.²⁶

In a blight on the tax academy and on the state of tax policy in America, this sort of modern-day double taxation arrangement continues with little notice or objection from tax academics.²⁷ For example, the Supreme Court’s opinion in *San Antonio Independent School District v. Rodriguez*,²⁸ the seminal Supreme Court holding on school funding mechanisms and the Fourteenth Amendment, has been cited just seven times total in any leading tax-focused law journals, and citations to it are exceedingly rare in any tax law-oriented academic articles.²⁹

Further, local property taxes are far from the only tax regimes with disparate racial impacts that mainstream tax analysis has disregarded.³⁰ As a colleague poignantly observed, faced with poll taxes—a racialized affliction on American democracy through much of the twentieth century—standard tax equity analysis misses the real social issue at stake: it would conclude that

revenue; the poorest districts spent an average of \$2,978 per student while the wealthiest districts spent an average of \$7,233 per student).

25. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494–95 (2003).

26. Indeed, Michigan’s inequitable school funding scheme flows directly from facially neutral features of federal tax policy, as discussed *infra* notes 90–92 and accompanying text.

27. One recent exception is Brian Highsmith, Essay, *The Implications of Inequality for Fiscal Federalism (or Why the Federal Government Should Pay for Local Public Schools)*, 67 BUFF. L. REV. 407 (2019). On the other hand, there are many critiques of school funding inequality by education law scholars. See, e.g., Gene R. Nichol, *Poverty and Equality: A Distant Mirror*, 100 MICH. L. REV. 1661, 1672–73 (2002) (discussing that most states have been subject to lawsuits challenging unequal school funding).

28. 411 U.S. 1.

29. Using the complete Westlaw database, I found five references in *The Tax Lawyer*, and one each in the *Tax Law Review* and the *Virginia Tax Review*. E.g., Kirk J. Stark, *Rich States, Poor States: Assessing the Design and Effect of a U.S. Fiscal Equalization Regime*, 63 TAX L. REV. 957 (2010). Similarly, a recent Westlaw search for any law review citation to both the federal tax code and *Rodriguez* yielded a single tax law-focused article, Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875 (2018), though it did find many education policy-focused articles that mention the tax policy issues in passing (also note: Highsmith, *supra* note 27, is apparently not yet included in Westlaw). As discussed *infra* notes 96–101 and accompanying text, the connection between the federal tax code and the property tax base for (most) school funding is hardly tenuous.

30. See Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (discussing the differences in the tax benefits received by white people and black people, such as benefits related to wealth, wealth transfers, and home ownership, as well as employee benefits and tax rate treatment); see also Chye-Ching Huang & Roderick Taylor, *How the Federal Tax Code Can Better Advance Racial Equity*, CTR. ON BUDGET & POL’Y PRIORITIES (July 25, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/7-25-19tax.pdf> [<https://perma.cc/32KL-TQGL>].

poll taxes are unfair because they fail to account for varying abilities to pay.³¹ Because, in this analysis, equity is focused on distribution, and distribution is evaluated based on whether an individual taxpayer is able to bear her tax burden, a blatantly racist tax policy could pass muster, as could a tax policy that inhibits a fundamental democratic right.³²

But something must be missing from that tax policy analysis. As elaborated in Part II of this Review, Walsh's and Infanti's books explore the extent to which tax analysis and tax policymaking have persistently failed to account for these sorts of social concerns. Just as the standard tax policy analysis has had little to offer to understand or recognize racial inequity, it also has little to say regarding gender discrimination or heteronormativity in the tax code, differences in physical ability, or power dynamics.³³ Walsh and Infanti each call for a more inclusive tax policy that accounts for these sorts of effects.

Inspired by Walsh's and Infanti's and others' work considering the nexus of tax policy with political power, inequality, and social hierarchies,³⁴ Part III of this Review considers how tax policymakers can meaningfully confront tax laws that perpetrate these ills. I argue that the two books show how U.S. tax policies and tax systems undermine the foundations of democratic governance—tax policy has weakened the system of government that is sup-

31. I thank Jeremy Bearer-Friend for making this point, and for sharing the materials he developed to explore the issue with students in his tax policy seminar. An economic gloss on poll taxes is that the tax distorts voting behavior, but, notwithstanding the sacrosanct nature of voting in a democracy, the value of any individual's right to vote must be miniscule in economic terms: individual votes are almost never determinative of any election. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down the poll tax, reasoning that voting is a fundamental right). See generally Andrew Gelman et al., *What Is the Probability Your Vote Will Make a Difference?*, 50 ECON. INQUIRY 321 (2012).

32. There are many takes on what tax equity analysis is and should be; some do indeed incorporate social norms or other social values like anti-racism into the analysis. See, e.g., Huang & Taylor, *supra* note 30; *infra* note 33.

33. Various commentators have taken on these exact issues, and very effectively; but this work is most often, internally and externally, treated as outside the scope of typical tax policy analysis. E.g., CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009) (featuring work by authors mentioned here as well as Carolyn C. Jones, Marjorie E. Kornhauser, Lisa C. Philipps, Nancy C. Staudt, Alice G. Abreu, Beverly I. Moran, Mylinh Uy, David A. Brennen, Karen B. Brown, Patricia A. Cain, Lily Kahng, Francine J. Lipman, and others); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Tessa R. Davis, *Mapping the Families of the Internal Revenue Code*, 22 VA. J. SOC. POL'Y & L. 179 (2015); Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J.L. & SOC. POL'Y 206 (2014); Moran & Whitford, *supra* note 30; Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of Magdalin v. Commissioner for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283.

34. See, e.g., JEREMY BEARER-FRIEND, THE GREAT DEMOCRACY INITIATIVE, RESTORING DEMOCRACY THROUGH TAX POLICY (2018); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017); Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421 (2018); Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. (forthcoming 2020); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825 (2001); Sugin, *supra* note 14.

posed to be characterized by collective decisionmaking with equality among the decisionmakers.³⁵

To respond, I suggest recalibrating tax policy and tax policymaking to account for democratic values. Tax systems are a key point of contact between citizens and their governments. The act of paying taxes in a democracy could be an opportunity for government to justify itself to the taxpayer and for the taxpayer to build faith in government institutions.³⁶ These considerations suggest that the substance of tax policy, and community members' experiences with the tax system, should be conceived to purposively strengthen democracy and connect democratic institutions to citizens. Unfortunately, the racialized tax history Walsh presents and the portrait of contemporary tax policy Infanti renders show our tax systems doing the opposite.

Engaging in tax policymaking that strengthens our democracy requires defining the democratic values that tax policy can and should strengthen. This Review builds on work by critical tax scholars—including Infanti—and other work proposing a more expansive view of tax equity.³⁷ I begin to sketch out a broader array of democratic considerations that should be accounted for in tax policymaking, starting with a more robust version of democratic accountability and consideration of how tax policy can promote and empower community members.

I. THE FAILURES OF TAX POLICY

In *Racial Taxation*, Walsh traces the roots of the “taxpayer” identity, showing that it emerged and remained important in policy and legal debates in ways that strategically affirmed white supremacy (Walsh, p. 3). Walsh discusses the double taxation of black property owners in Mississippi, as described in the Introduction to this Review, and finds, through careful analysis of Jim Crow-era legal challenges, this story repeated in other juris-

35. See generally Mark E. Warren, *Democracy and the State*, in THE OXFORD HANDBOOK OF POLITICAL THEORY 382 (John S. Dryzek et al. eds., 2006); Tom Christiano, *Democracy*, STAN. ENCYCLOPEDIA PHIL. (July 27, 2006), <https://plato.stanford.edu/entries/democracy/> [<https://perma.cc/8JTP-LZPE>].

36. This idea has been promoted in various forms, for example as one of the benefits of “fiscal citizenship.” LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 54 (2013); 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 (Kimberly J. Morgan & Anna Shola Orloff eds., 2017).

37. James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1130, 1145 (2008) (arguing that “[a]cademics and policymakers pay little attention to the interaction of a tax system with the objectives of a just government” and that tax policies should “strengthen democracy, i.e., give all participants an equal voice”); Sugin, *supra* note 14, at 656, 661 (introducing the concept of “[d]emocratic fairness,” which “consists of treating individuals as autonomous people with rights and interests that are important to consider in designing and applying rules,” i.e., it requires considering how the tax system affects “identity, autonomy, and citizenship”).

dictions (Walsh, pp. 50–67). Nonetheless, the pervasive view of (white) policymakers and (white) judges was that, if anything, white “taxpayers” have been asked to bear the burden of schools for black non-taxpayers. As described in Section I.A, the tax policies and structures Walsh details are central to the shape of the American tax system and American public institutions today, including public schools, public charities, and public assistance programs.

In *Our Selfish Tax Laws*, Infanti details how existing U.S. federal tax policies express problematic power structures that exclude and disadvantage many, if not most, taxpayers.³⁸ His troubling account, described in Section I.B, shows how the federal tax code establishes and maintains social injustice—power begets favorable tax policy, which begets more power. He argues that we are stuck in this cycle and are unable to recognize it as such because of the volume and complexity of tax policies and tax laws (Infanti, pp. 148–50).

A. *Racial Taxation and Our Racialized Tax History*

Racial Taxation is, from start to finish, a vivid depiction of the under-scrutinized fiscal history of elementary through secondary education in the United States. That history gives rise to two claims—the first related to racial discrimination and local school finance structures, and the second related to racial discrimination and the term “taxpayer.”

First, Walsh argues convincingly that education finance in the modern era (i.e., post-*Brown v. Board*) is inextricably linked to explicitly racist finance structures of the past. Although this is not a revelation on its own,³⁹ Walsh uncovers various un- or under-reported episodes that further reveal just how dubious and racialized the fiscal structures that reach from post-Reconstruction through to today were and are.

Second, Walsh uncovers a fascinating history of uses of the term “taxpayer.” Often, and particularly post-*Brown*, the word has been used to justify the racist school financing policies she details—“taxpayer” has “worked as a barely hidden code in service of white supremacy, patriarchy, and racial capitalism to define out the ‘nontaxpaying other,’ who is implicitly less entitled to protections and rights” (Walsh, pp. 3–4). But even as the historical story she tells illustrates “historical elisions between ‘taxpayer,’ ‘citizen,’ and ‘white’ that have been deployed to help justify and alibi racial inequality” in the post-*Brown* era (Walsh, p. 2), it also shows a more complex and, indeed, inspiring story: the term “taxpayer” has been embraced and celebrated by a variety of nonwhite racial groups fighting for inclusion and equality before the law.

38. Infanti, pp. 9, 13–14, chapter 3 (housing policy), chapter 4 (the taxable unit).

39. See, e.g., ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

Walsh starts with the basic fact that the local tax districts that funded elementary through secondary schools were established during a time of “widespread segregation” throughout the country (Walsh, p. 8). In many areas, “whites were taxed only for white schools and blacks were taxed only for black schools, and economic inequality and discrimination did the remainder of the work” (Walsh, p. 50). These school funding structures resulted in appallingly divergent levels of funding between neighboring schools. Owensboro, Kentucky in the early 1880s provides an example: A combination of property taxes and poll taxes, applied to every property-owning or poll-going community member, was divided into a “white” revenue stream and a “black” revenue stream, yielding \$9,400 for the former and \$770 for the latter (Walsh, pp. 30–31). Exacerbating the funding imbalance, the white district was permitted to issue bonds to build a school; the black district was not (Walsh, p. 31). Walsh details similar situations in Arkansas, North Carolina, and Mississippi (Walsh, pp. 31–32). In short, the post-Reconstruction fiscal structure fueled school segregation and inequality.

Notwithstanding occasional victories by minority students who sought help from the courts to address education inequities,⁴⁰ the local tax structures and accompanying inequities have “remain[ed] largely intact” (Walsh, p. 8). These structures include explicit racial earmarking that continued “well into the twentieth century” (Walsh, p. 33). Thus, local tax structures today remain “comparable to their origins in the mid-nineteenth century,” and that means racially motivated design features from then remain salient in the modern era.⁴¹ Indeed, as exemplified by school districts around Detroit, Michigan,⁴² the same sorts of funding disparities persist today, often with racial dynamics similar to what Walsh describes. There seems to be path dependence in the legal and policy framework that continues these arrangements; at the very least, pervading political attitudes have been more accepting of this state of affairs—or willfully blind to it—than they ought to be.⁴³

But whereas the history of racialized funding disparities has been depressingly ossified, the history of the term “taxpayer,” though often racialized, has been surprisingly dynamic. As Walsh shows, taxpayer status was wielded by a diverse range of litigants, who perceived it to be legally salient—and perhaps believed it provided a basis for standing. This suggests that taxpayer status is, in some broadly shared sense, admirable. Walsh starts in the 1870s, when taxpayer status was used to try to combat school segregation in

40. See *infra* notes 46–49 and accompanying text.

41. Walsh, p. 8. This is in contrast to the federal income tax—by the time it was established in 1913, legal segregation had been rolled back in at least some of the country.

42. *Supra* notes 19–23 and accompanying text.

43. Cf. AVIDIT ACHARYA ET AL., DEEP ROOTS: HOW SLAVERY STILL SHAPES SOUTHERN POLITICS 4, 166 (2018) (arguing that “political attitudes persist over time, making history a key mechanism in determining contemporary political attitudes,” and describing various mechanisms by which historical circumstances seem to affect contemporary views (emphasis omitted)).

both the Reconstruction states in the South and Union states in the North. At that time, the taxpayer label had been wielded prominently by another group seeking political change: In 1869, white women's suffrage activists in Connecticut began a tax protest in which they refused to pay taxes until they were given the right to vote.⁴⁴ This prompted a series of female-led "tax rebellions" across the country.⁴⁵ The claims of taxpayer status by black property owners in the 1870s that Walsh details used similar language to the women's suffragists, suggesting that taxpayer status indeed had a broad and potentially nonexclusive appeal 150 years ago.

Walsh details an Illinois case from that period, in which taxpayers used their status to shut down a school built for the "three or four' children of color" in the district, students who could "easily be accommodated at the schoolhouse with other students of the district."⁴⁶ The Illinois Supreme Court held that to maintain the separate school "can only be regarded as a fraud upon the tax-payers of the district."⁴⁷ Taxpayer status was cited in successful challenges against segregated schools by black students in Michigan and Iowa around the same time (Walsh, Chapter One).

Later, in the early twentieth century, the courts started to protect discriminatory arrangements in the face of legal challenges invoking taxpayer status by racial minorities. A Chinese American student in Mississippi challenged her exclusion from local white schools, appealing the case to the U.S. Supreme Court before ultimately losing.⁴⁸ In files used to litigate the case in lower courts, attorneys for the plaintiff noted that the student's "father is a tax payer" and appealed to the "value" of attending school (Walsh, p. 35). Similarly, multiracial students in South Carolina were removed from a white school and sued to be readmitted.⁴⁹ Although the South Carolina Supreme Court dismissed their claim, the trial testimony shows that the plaintiffs relied on their status as property owners, and thus payers of "school taxes levied in the district," as a basis for permitting the students to attend the white schools (Walsh, pp. 39–41).

Walsh describes other episodes that show an inconsistent meaning to taxpayer at various times, culminating in the fallout from the *Brown* decision.⁵⁰ Examining NAACP correspondence as the organization developed its

44. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 146–47 (rev. ed. 2009).

45. *Id.* These protests were stamped out by the Supreme Court's holding in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171–73 (1875), that voting rights were not "coextensive with . . . citizenship."

46. Walsh, pp. 20–21 (citing *Chase v. Stephenson*, 71 Ill. 383, 386 (1874)). The race of the taxpayer-plaintiffs is not specified; it seems that Walsh could not discern their race from the record.

47. Walsh, p. 20 (quoting *Chase v. Stephenson*, 71 Ill. 383, 386 (1874)).

48. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

49. *Tucker v. Blease*, 81 S.E. 668 (S.C. 1914).

50. *E.g.*, *Piper v. Big Pine Sch. Dist.*, 226 P. 926 (Cal. 1924) (holding that the status of Native American students in California as U.S. citizens and children of taxpayers entitled them

litigation strategy for challenging segregated schools in the 1920s and 1930s, Walsh found many examples of black people emphasizing their status as “taxpaying citizens” when pursuing legal challenges (Walsh, p. 61). The NAACP, in turn, argued in numerous cases that separate schools under *Plessy v. Ferguson* were a “waste of taxpayer resources” (Walsh, pp. 69–70). The book walks through the more familiar history of the slow but ultimately successful effort to overturn separate-but-equal doctrine, and revealing plaintiffs’ attestations of taxpayer status makes the history all the more compelling. Taxpayer status was also central to NAACP challenges to graduate school education, which the NAACP realized could not be provided separately without fiscally straining states (Walsh, pp. 69–84).

This taxpayer-oriented litigation strategy proved successful and led directly to the *Briggs v. Elliott* case that was consolidated with *Brown v. Board of Education*. The *Briggs* case was filed on behalf of “parents and taxpayers” in South Carolina (Walsh, p. 78). The county superintendent responded that black students “did not ‘pay enough in taxes’ to warrant” transportation to and from school (Walsh, p. 78). That view was cast aside by a dissenting opinion at the district court level,⁵¹ a dissent that would be echoed in the Supreme Court’s unanimous opinion in *Brown*.⁵² But, alas, the *Brown* result gave rise to explicitly racist use of taxpayer status in opposition to school desegregation from the mid-1950s through the early 1970s, when Walsh’s history concludes (Walsh, pp. 85–131). Taxpayer status was adopted by opponents of desegregation and used with “symbolic meaning premised in whiteness” (Walsh, p. 4).

Turning to current day, I see an alternative future for our understanding of taxpayer status, grounded in part on Walsh’s history. The diversity of claims of taxpayer status that Walsh documents can be seen as offering hope.⁵³ Although the term “taxpayer” has been used as a tool of exclusion, and did indeed make it into the “legal consciousness of many white segregationists,” those segregationists were often wrong: they “assumed” that blacks “did not ‘pay taxes’” and that “black schooling was ‘a result of white tax dollars.’” (Walsh, p. 107). But the facts, including the NAACP’s successful litigation strategy, show otherwise. Walsh summarizes that “in the case of many white schools in the Deep South, black taxpayers had likely disproportionately paid into the resources provided for white education over the years, rather than the reverse.”⁵⁴ In short, tax structures have been thoroughly

to attend local schools even though separate schools had been established for noncitizen tribal members); Walsh, pp. 46, 85–131.

51. *Briggs v. Elliott*, 98 F. Supp. 529, 538–48 (E.D.S.C. 1951) (Waring, J., dissenting).

52. See Walsh, p. 78.

53. This echoes Vanessa Williamson, whose conclusion is that taxpayer status gives rise to civic pride and inclusive sentiments. VANESSA S. WILLIAMSON, *READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES* (2017).

54. Walsh, p. 107. The idea that white taxpayers subsidize black taxpayers today and historically is further undermined by the intricacies of state and federal school funding formulas, which often contribute to school funding disparities in ways that are hard for the public

racialized, but taxpayer status, despite being deployed as racially exclusive, is in fact a broadly shared—and widely embraced—designation.⁵⁵

B. *Our Selfish Tax Laws Protecting Power and Privilege*

Walsh closes by considering tax policy in the United States more broadly, with a concerning summation: “The quiet power of tax systems is their ability to hide in plain sight, even as they enact great injustices” (Walsh, p. 174). Anthony Infanti shares a similar insight about the ubiquity and destructive power of tax systems, and he uses it as his starting point in *Our Selfish Tax Laws*. While Walsh’s book focuses on the particular injustices promoted through local tax structures to fund education, Infanti pulls back the lens: the ills that Walsh describes as racial taxation are not a malignant tumor on an otherwise healthy body but rather a systemic, pathological affliction on the entire U.S. fiscal state.

Infanti portrays U.S. tax laws as shaping a “portrait” of “a tax system that has been made by and for those with power and privilege—a tax system that values, validates, and supports their lives and life choices—and that largely dismisses all ‘others’” (Infanti, p. 9). He argues that “the messages conveyed by that portrait about our society[]should be of vital concern to all of us as Americans” (Infanti, p. 1), and he is concerned in part because, despite the country’s excluding tax policies, “‘mainstream’ tax academics” have ignored “the impact of the tax laws on subordinated groups” (Infanti, p. 13). Perhaps more to the point, Infanti suggests that it is *because* of this blind spot for tax code–perpetrated subordination—in the eyes of tax academics and also the public as a whole—that these tax policies have been allowed to take root.

Infanti makes this case by summarizing contributions to the field of critical tax scholarship and suggesting a new analogy for thinking about the combined contributions of critical tax scholarship: the notion that the tax law portrait reveals the true American “self.” Additionally, Infanti conducts comparative case studies that show how the United States has dealt with common policy challenges differently than some other countries. Each of these analytical moves is described below. Infanti concludes with a call to action of sorts, urging Americans to understand that our tax laws should reflect our true selves, in all of our diversity and difference.

To explore who our American “self” is, Infanti undertakes case studies in two different areas of tax policy, comparing U.S. tax provisions with those

(and even non-finance experts) to understand. See Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385 (2019).

55. That taxpayer status continues to be widely embraced is supported by some more recent empirical work. See WILLIAMSON, *supra* note 53, at 44 (explaining that “explicitly bigoted remarks” that targeted “minorities of all sorts—racial, ethnic, religious, and sexual,” amounted to “about 1 percent” of her survey respondents). For a more general analysis of Americans’ attitudes toward taxes over time, see Andrea Louise Campbell, *What Americans Think of Taxes*, in THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE 48 (Isaac William Martin et al. eds., 2009).

found in Canada, France, and Spain (Infanti, Chapters Three and Four). The first area of comparison is housing policy (Infanti, Chapter Three). Infanti describes the American approach as consisting of a variety of incomplete and ineffective spending policies (direct expenditures and also tax expenditures). Some of these policies feature socially inclusive stated goals such as “fair housing” and nondiscrimination—including housing vouchers provided to low-income renters and the low-income housing tax credit (LIHTC), which subsidizes the construction of housing for low-income people.⁵⁶ I approximate that the federal government committed just under \$200 billion for these types of subsidies over the most recent five-year period.⁵⁷

But other tax subsidies work to make those stated inclusive goals—and those seemingly substantial expenditures—merely “lip service” (Infanti, p. 54). These other subsidies include the home mortgage interest deduction and the deduction for state and local property tax payments, which amounted to \$836.4 billion over the same five-year period.⁵⁸ These other subsidies contain no nondiscrimination provisions. Thus, subsidies for potentially discrimination-permissive housing overwhelm subsidies that expressly limit discrimination. The net effect is that, notwithstanding some outward concern for some types of equity, U.S. housing policy, including that which is carried out through the tax code, has worked to fortify segregated housing.⁵⁹ Thus, Infanti argues that, overall, U.S. housing policies “reward[] and entrench[] . . . privilege at the expense of those who actually need help.”⁶⁰

Infanti classifies the housing policy provisions as part of an “exposed legal framework,” such that some of the policy machinations carry out an “expressive” function (Infanti, p. 83). In the United States in particular, the expressive function of some elements of tax policy is distinct from a set of

56. *E.g.*, Fair Housing Act, 42 U.S.C. §§ 3601–19 (2018); Treas. Reg. § 1.42-9(a) (requiring that LIHTC units are rented in a manner consistent with housing nondiscrimination laws, under threat of loss of tax credits); 24 C.F.R. § 982.1 (2019).

57. Infanti notes just \$43 billion of low-income housing tax credit expenditures over that period, Infanti, p. 53. For a more complete comparison, I have added to that number around \$100 billion for housing vouchers (less than \$20 billion per year) and \$50 billion for public housing. See generally U.S. DEP’T OF HOUS. & URBAN DEV., FISCAL YEAR 2020 BUDGET IN BRIEF (2019), <https://www.hud.gov/sites/dfiles/CFO/documents/HUD2020BudgetinBrief03072019Final.pdf> [<https://perma.cc/74GB-PF66>].

58. I.R.C. §§ 163(h), 164 (2012 & Supp. V 2018); Infanti, pp. 47, 53.

59. See also Dorothy A. Brown, *Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Inequity*, 49 U. MEM. L. REV. 205 (2018); Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 919 (2018) (making a more expansive argument that “federal tax law . . . rewards White-flight and economic segregation” and thus “may exacerbate” racial segregation).

60. Infanti, p. 54. Infanti goes on to compare U.S. housing policy and tax policy to that of Canada, where he finds a system equally reliant on the tax code but much less outwardly focused on helping those who do not have housing. Infanti, pp. 58–60. Rather, Canadian housing policy reflects “a society wedded tightly to the market,” and unabashedly so. Infanti, p. 59. This reader found the comparison surprising and enlightening given Canada’s reputation as a more socially progressive government, and also given that the government has recognized a right to accessible housing, Infanti, p. 58 & n.122.

“subliminal” messages (Infanti, pp. 83–84). Infanti further explores this concealed messaging element by turning to a comparison of how each country defines and uses the concept of different taxable units (Infanti, Chapter Four). The U.S. portion of this chapter consists of a critical comparison of individual taxation in which various family structures are automatically characterized by law, without any choices for the subject taxpayer. Infanti contrasts this approach with the check-the-box regime, which allows owners of business entities to choose how the business is taxed.⁶¹

These tax rules, Infanti argues, shroud strong value choices that reinforce privilege. The rigidity of the family unit for tax purposes affects other policy areas: there is no provision, for example, for a nonmarried couple (say, two single parents with children) to jointly purchase a residence and each receive a deduction for their respective shares of the mortgage or local property taxes. Thus, the preference for one model of family affects who can benefit from other tax provisions, which reinforces the underlying privilege. In the other countries, in contrast, rules prescribing individual taxable units are more flexible, reflecting “willingness to evolve and adapt to social reality.”⁶² Again, in these differences, Infanti builds a case that tax systems are a reflection of the society in which they operate, including, pervasively, the social values of that society.

So, then, who is the American “self”? To bring the full reflection into focus, Infanti synthesizes these case studies along with his and other critical tax scholars’ extensive body of work studying the U.S. tax system over decades. The American “self” that the tax code establishes is a cisgender man,⁶³ who is “presumptively heterosexual” (Infanti, p. 115), implicitly white,⁶⁴ “physically and mentally able” (Infanti, p. 120), a citizen (Infanti, p. 122), and married (Infanti, p. 111) “with a stay-at-home spouse . . . who is subservient and relegated to invisibility.”⁶⁵ And, to top it off, this American “self” is “wealthy and privileged,” as indicated by a host of provisions that favor capital income over labor income and unearned income over earned income.⁶⁶

61. Infanti, pp. 88–89; see also Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 611–12.

62. Infanti, pp. 92–93. For example, Infanti describes the French social and tax policy provisions permitting couples to enter into a PACS (*pacte civil de solidarité*) that provides some of the benefits of marriage as between unmarried same-sex and different-sex couples. Infanti, pp. 94–95.

63. The taxpayer in the code is almost always a “he,” almost never a “her,” and often male and female pronouns are deployed in stereotyped roles—for example, with a husband paying alimony to a wife in regulations. Infanti, p. 110.

64. Infanti, p. 127 (“[D]espite their ostensible neutrality, the tax laws have had—and continue to have—a disparate impact upon members of racial and ethnic minority groups . . .”).

65. Infanti, pp. 112–13 (cleaned up).

66. Infanti, pp. 124–26 (cleaned up).

This tax portrait, to be sure, does not reflect our real America. Women outnumber men (51% to 49%);⁶⁷ there are more unmarried households than married households (the portion of unmarried adults is not far behind married—45% to 55%);⁶⁸ nonwhite people make up 40% of the country.⁶⁹ Other characteristics that do not match the tax self are found in significant minorities of the population: 12.8% of people in the United States (i.e., more than 35 million) have physical or mental disabilities;⁷⁰ 4.5% identify as members of the LGBT community.⁷¹ There are 22 million noncitizens in the country.⁷² The American “self” Infanti finds in the U.S. federal tax system ain’t us.

So what has happened in the United States to create such a disconnect between the society we are and the tax laws we have? And what can be done to remedy the situation? Walsh sets up Infanti on this point, offering that the remedy to the problematic and still-existing tax structures she traces is “a more integrated legal understanding of the . . . connections between race and class, taxation, and inequality” (Walsh, p. 14). Of course, this is precisely what critical tax scholars have been pursuing for decades. Infanti’s book is motivated in part by the fact that critical approaches to tax policy have “failed to find a wide audience among tax scholars or application for its insights within tax policy.”⁷³

Thus, Infanti concludes with a call for Americans to reconceptualize how we think about and talk about our tax system and a call for critical tax scholars to refocus their work for greater impact on tax laws and policies. He suggests:

[C]ritical tax scholars (and their readers alike) should situate their contributions to tax policy discourse within the framework of the general benefits that flow from working toward a fair and inclusive tax system that embraces all Americans. An inclusive tax system would aim to fairly distribute benefits and share burdens among all Americans rather than . . . disproportionately benefiting a privileged few and burdening the already disadvantaged as our tax system does now. A fair and inclusive tax system . . . would

67. *Population Distribution by Gender*, KFF (2017), <https://www.kff.org/other/state-indicator/distribution-by-gender/> [https://perma.cc/G7XV-KZ7K].

68. *Statistics*, UNMARRIED EQUALITY (2018), <https://www.unmarried.org/statistics/> [https://perma.cc/M3QC-URV6].

69. Katherine Schaeffer, *The Most Common Age Among Whites in U.S. Is 58—More than Double That of Racial and Ethnic Minorities*, PEW RES. CTR. (July 30, 2019), <https://www.pewresearch.org/fact-tank/2019/07/30/most-common-age-among-us-racial-ethnic-groups/> [https://perma.cc/ED5K-6NZQ].

70. *Anniversary of Americans with Disabilities Act: July 26, 2018*, U.S. CENSUS BUREAU (June 6, 2018), <https://www.census.gov/newsroom/facts-for-features/2018/disabilities.html> [https://perma.cc/LD57-WWDL].

71. Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx> [https://perma.cc/L4FA-WXX7].

72. *Population Distribution by Citizenship Status*, KFF (2017), <https://www.kff.org/other/state-indicator/distribution-by-citizenship-status/> [https://perma.cc/5ERP-V5WT].

73. Infanti, p. 15 (quoting Knauer, *supra* note 33, at 227).

aim to distribute burdens according to relative capacity to bear those burdens and to distribute benefits in a way that maximizes the ability of all Americans to flourish. (Infanti, p. 18)

All of this looks well and good, at least to this reader's eyes. But, though Infanti recognizes the shortcomings of reform efforts to date, it is not clear why his call for an "inclusive" tax system will fare any better than earlier critical takes on U.S. tax policy. How do we change the American "self" of the federal tax code (and also of local fiscal policies that Walsh explores) into a true reflection of American society? Do critical tax theorists and policymakers need to repackage and further emphasize the deficiencies in existing tax policy (as Infanti suggests) for a broader audience, or must tax academics, policymakers, and analysts find a different way to import these arguments into ongoing tax policy discourse?

One way to synthesize Walsh and Infanti together is that Infanti calls for us to have a broader understanding of who is a taxpayer and how taxpaying affects all of us, and Walsh shows that historically, although tax structures have been used as tools of exclusion, taxpayer status is a mantle that has been broadly and proudly and productively claimed at various times. As Infanti summarizes, by "coming to see the expressive function of our tax laws, it is possible to realize that, rather than dividing us, our differences—which are accompanied by differential and disadvantageous tax consequences—are what so many of us have in common" (Infanti, p. 19).

II. DEMOCRATIC VALUES IN TAX POLICYMAKING

It is clear that the persistent inequities grounded in racist, heteronormative, or sexist fiscal structures as described by Walsh and Infanti are a symptom of a persistent power imbalance in American society. Although a basic precept of democratic governance is that each citizen should have an equal say in government,⁷⁴ vast and growing inequities have disempowered large swaths of the American populace. Direct regulation of our democratic institutions—that is, through campaign finance regulation—is one response,⁷⁵ but this effort has essentially failed, shut down by a new thread of inequality-protective constitutional interpretation.⁷⁶

Decades of these sorts of failures, fueling and compounded by escalating economic inequality, have given rise to growing recognition of a need to re-

74. See ROBERT A. DAHL, *ON DEMOCRACY* 37–38 (2d ed. 2015); Sugin, *supra* note 14, at 655–63 (contrasting this concept of fairness with "economic fairness").

75. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 122 (2016); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting more stringent judicial scrutiny of laws that potentially "curtail the operation of those political processes ordinarily . . . relied upon to protect minorities").

76. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010) (discussing the Supreme Court's evolving jurisprudence on questions of campaign finance reform); Levinson, *supra* note 75, at 140.

think the legal structures that shape economic and social relationships, to make those structures more broadly inclusive.⁷⁷ Scholars are turning to the possibility of more fundamental reforms to the ways economic power and political power are intertwined and the substance of the laws and policies that mediate economic life. Infanti's work fits into this mold: he is making the case that there may be answers to these challenges *within* the field of tax. I agree. Tax law and policy strikes me as an appropriate forum for instituting the sort of participatory democratic mechanisms that have been explored by democratic theorists as a way to combat political "domination" resulting from economic inequality.⁷⁸

This Part suggests that tax policymaking can be structured and carried out to make tax law more inclusive with a new focus on *democratic values*. By restructuring the tax policymaking process through framework legislation that requires specific types of inputs and outputs, we can facilitate these values, including fostering participation in the policymaking process, providing mechanisms for transparency and accountability, gauging how tax laws and tax administration work to promote trust and faith in government, and paying attention to how tax laws affect individual autonomy and political voice of community members, as well as adhering to rule of law principles.

The remainder of this Part introduces some ways that tax policymaking might be infused with democratic values, building on some prior scholarship that has addressed the interplay between taxes and democratic institutions.⁷⁹ I start here with a few possibilities that flow from specific problems with segregation, housing policy, and school funding inequities that Walsh and Infanti detail. In particular, their work highlights the failures of tax policymaking to foster transparency and accountability, and to consider political voice and autonomy of community members. For example, school funding structures that hide inequities have allowed white taxpayers to believe, incorrectly, that their tax dollars subsidize black students and other minorities. At the same time, federal policies that subsidize existing school

77. E.g., Symposium, *The Constitution and Economic Inequality*, 94 TEX. L. REV. 1287 (2016) (featuring essays on "constitutional political economy," which includes consideration of economic inequality, constitutional law, democratic theory, international trade, labor law, and other topics).

78. See RAHMAN, *supra* note 34. See generally LAW & POL. ECON., <https://lpeblog.org> [<https://perma.cc/V8QT-HGW4>].

79. Linda Sugin and James Repetti have each expressly made the case for analyzing tax policy through the lens of democratic values, although they do each propose introducing these concerns in limited ways. Sugin, *supra* note 14, at 619; Repetti, *supra* note 37, at 1132; see also Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1 (1996); Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323 (2008) (arguing that "revenue" policy should be designed to facilitate "a flourishing deliberative democracy," and arguing that that function can be separated, at least theoretically, from goals of redistribution and regulation); Glogower, *supra* note 34; Kleiman, *supra* note 34; Wolfgang Schön, *Taxation and Democracy*, 72 TAX L. REV. (forthcoming) (discussed *infra* note 88).

funding for some districts have the effect of further advantaging the already advantaged.⁸⁰

The premise of the discussion that follows is that policymakers should be conscious about whether tax policy and the policymaking process are accounting for democratic values in a positive (and not negative) way. I do not make normative commitments to a particular theory of democracy, nor to any specific institutional arrangement. Rather, this is intended to start to distill some concepts relevant to inclusive tax policymaking that could fit within a broad array of liberal conceptions of democracy—values to which Americans broadly subscribe in general terms, but which are generally absent from tax policymaking. As described by Robert Dahl, among others, American democracy generally aspires toward liberal democratic values—our Bill of Rights reflects commitments to individual liberties, and our republican structure indicates commitments to rule by the people.⁸¹ This very general notion of American democracy is my starting point for this discussion. There is surely plenty to contest as far as particulars—mechanisms by which specific democratic values might come to bear in tax policymaking, for example; for the moment, I defer those more exacting debates.

To start, a fundamental tenet of democratic theory is accountability.⁸² In a democratic republic, the people are the sovereign, and elected officials must be held accountable to the people. Accountability requires transparency—so that the people can determine what their government is doing—and responsiveness, meaning that accountability should result in the people getting what they want.⁸³ In American public law, the conventional wisdom has settled with a formal version of accountability that is really quite limited, simply requiring that decisions be made by elected officials. As long as these representatives face the electorate from time to time, their actions (or even the actions of their subordinates) are thought to be consistent with (some version of) the will of the people.⁸⁴

The tax code is an area of federal law that Congress has been particularly active in legislating and relegislating; unlike, say, education law or securities

80. In addition to the hidden tax subsidies discussed here, the method by which direct federal school funding is calculated contributes as well. See Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313 (2010).

81. See DAHL, *supra* note 74, at 48–54.

82. See, e.g., John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131 (Adam Przeworski et al. eds., 1999); Jeremy Waldron, *Accountability: Fundamental to Democracy* (N.Y. Univ. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14-13, 2014) (discussing various models of different types of accountability).

83. See, e.g., James A. Stimson, *Party Government and Responsiveness*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 82, at 197, 201.

84. See, e.g., Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES LEGAL SCHOLARSHIP, Mar. 2005, at 1, 20. This conventional wisdom can accept that the “will of the people” can be hard to discern.

regulation, subjects on which Congress may enact significant legislation once a decade or less frequently, Congress has enacted major changes to the tax codes every few years for decades.⁸⁵ Through the lens of accountability and responsiveness, however, the results in tax law have been abysmal. Qualitatively, Infanti's American "self" shows the myriad problems. Empirically, even with the American "self" hidden from public view by technical arcana, data show widespread dissatisfaction with the current state of federal tax policy.⁸⁶

All of this suggests some breakdown in the accountability framework. Because the federal income and payroll tax system is the primary interface between our democratic government and the people, this degree of breakdown feels particularly devastating for the project of American democracy.⁸⁷ Thus, as a starting point for inserting democratic values into tax policymaking, the process for enacting tax rules should aspire to model real democratic accountability.⁸⁸

Consider again housing policy that is affected by and carried out through the tax code—one of the subject areas that Walsh and Infanti draw out as areas of particular concern—and particularly the recent proposal to uncapped the deduction for state and local taxes. True democratic accountability would first demand transparency. A transparent policymaking process requires us to understand what might be the effect of the policy—in this case, the unlimited deduction on state and local taxes. Recent experience could show us that an unlimited deduction is, to echo Walsh, an example of federal tax policy fueling inequality and social division, hidden in plain sight.⁸⁹

Returning to the school districts around Detroit is illustrative. I approximate that 60% of taxpayers in Birmingham claimed itemized deductions in

85. Prior to 2017, Congress made significant changes to the tax code in 2013 (American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013)), 2010 (Tax Relief Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296), and 2009 (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115). See 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, 3–4, 19–30 (1990), for a discussion detailing many substantial pieces of tax legislation in the 1980s.

86. For example, a recent Pew survey found that 82% of Americans feel that some corporations do not pay their fair share of taxes, and 73% bemoan the complexity of the tax system. *Growing Partisan Divide over Fairness of the Nation's Tax System*, PEW RES. CTR. (Apr. 4, 2019), <https://www.people-press.org/2019/04/04/growing-partisan-divide-over-fairness-of-the-nations-tax-system/> [<https://perma.cc/559W-H67W>].

87. See ZELENAK, *supra* note 36.

88. Wolfgang Schön describes some of the challenges in this realm in his forthcoming article *Taxation and Democracy*, *supra* note 79, and builds his discussion on the concept that there should be "congruence" between the interests that set tax policy, the people who pay the taxes, and the people who benefit from the tax revenue.

89. Cf. Gladriel Shobe, *Economic Segregation and the Local Tax Deduction* (2019) (unpublished manuscript) (on file with the *Michigan Law Review*) (arguing that federal deductions for state and local taxes promote economic segregation).

2016,⁹⁰ and thus claimed a deduction for their state and local property taxes. That deduction amounts to an annual federal subsidy of something like \$10 million, on total school spending of \$143 million (i.e., the federal government subsidized 7% of the school district's total budget).⁹¹ In contrast, I approximate that, in nearby Eastpointe, around 18.5% of federal income taxpayers itemized, resulting in approximately \$360,000 of hidden federal subsidy in a total budget of \$37 million (i.e., just 1% of the total budget).⁹² Transparency as to how these sorts of tax provisions work in the real world could reshape debates about how the federal government should be involved

90. This 60% estimate is derived from IRS data showing the portion of taxpayers who itemize in discrete income bands—for example, just 7% of households with income below \$30,000 itemized, whereas 44% of households earning \$50,000 to \$99,999 did so, along with 80% of households with income between \$100,000 and \$499,999. *Briefing Book, TAX POL'Y CTR.* (2016), <https://www.taxpolicycenter.org/briefing-book/what-are-itemized-deductions-and-who-claims-them> [<https://perma.cc/E56R-TZL4>]. In 2016, Birmingham, Michigan had a median income of \$115,191 and a mean income of \$167,588. *Income in the Past 12 Months (in 2016 Inflation-Adjusted Dollars)*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=S1902%3A%20MEAN%20INCOME%20IN%20THE%20PAST%2012%20MONTHS%20%28I%20N%202016%20INFLATION-ADJUSTED%20DOLLARS%29&g=97000000US2612450,2605850&hidePreview=false&tid=ACST5Y2016.S1901&t=Income%20%28Households,%20Families,%20Individuals%29&y=2016&vintage=2016> (on file with the *Michigan Law Review*). Based on these numbers, I approximate that for the half of the population earning above the median, 80% itemized; for the quarter below the median, 40% itemized; and for the bottom quarter, 30% itemized. Thus, I approximate that 60% of households in the district claimed itemized deductions in 2016. The IRS report and the census data use different measures for income, so these calculations are slightly imprecise. Specifically, the IRS data is based on Adjusted Gross Income (AGI)—which is income net of business expenses and certain above-the-line deductions and exclusions, such as qualified retirement savings—whereas the census data is based on a more expansive definition of income that will look higher than AGI for the same household.

91. I approximated the subsidy amount based on the 60% portion of itemizers, as calculated *supra* note 90, and attributing to them 60% of the revenues derived by the district from property taxes. Total revenues from property taxes were \$67,197,000. *Annual Survey of School System Finances: Revenue of Public Elementary-Secondary School Systems in the United States by School System: Fiscal Year 2016*, U.S. CENSUS BUREAU [hereinafter *Annual Survey*] (on file with the *Michigan Law Review*). I calculated the subsidy amount based on a marginal tax rate of 25%. This method is imprecise for at least three reasons, which may offset: First, it does not account for some portion of local property taxes that are paid by businesses (although those taxes are also deductible for federal tax purposes). Second, it may understate the deductible portion of local property taxes—because higher property taxes *cause* some people to itemize, property tax revenues are likely skewed toward itemizers rather than proportionate. Third, the marginal rate may be an underestimate—in 2016, the 25% bracket covered joint filers earning \$75,300 to \$151,900, so many itemizers were deducting at marginal rates of 28% or above. *Rev. Proc.* 2015-53, 2015-44 I.R.B. 615, 617.

92. I used the same methods for these estimates as described *supra* notes 90–91. In Eastpointe, the median income was \$41,561 and the mean income was \$49,700. *Income in the Past 12 Months*, *supra* note 90. I estimated that for the half of the population earning above the median, 30% itemized; for the half below the median, 7% itemized. Thus, approximately 18.5% of Eastpointe households itemized overall. Total revenues from property taxes were \$7,802,000. *Annual Survey*, *supra* note 91. I attributed 18.5% of the revenues derived by the district from property taxes to the itemizers, and then calculated the subsidy based on a tax rate of 25% (which may be an overestimate for the converse reason described *supra* note 91).

in local school funding issues, and in the school funding equity debate.⁹³ A version of the tax system and tax policymaking that was designed for democratic accountability would lift the veil, with tax administrators providing real, intensive analysis of effects like this.

Analysis to inform tax policy debates could go well beyond the typical distributional tables that are prepared—sometimes, that is, when Congress so requests and allows time for staff to do the work, but not always—to reveal the effects of proposed legislation by income level. Better analysis for a policy like the deduction for state and local property taxes would allow policymakers prior to enactment (and administrators and policymakers after enactment) to understand who will benefit (or does benefit) directly from the policy (e.g., men, women, families, by race, by location), to what extent (e.g., amount and distribution by income level, by wealth level), and to what effect on other government policies and goals (e.g., providing a comparison of direct and indirect subsidies to public school districts, or analyzing the subsidy effect by race across districts).

Greater attention to and awareness of the particular and far-reaching effects of tax policy could promote other democratic values as well. Another precept of liberal democratic governance is freedom and autonomy for members of the community.⁹⁴ Tax policy, as experienced by the community, can strengthen, weaken, or transform individuals' feelings about their own identity and autonomy.⁹⁵ Thus, again considering the state and local tax deduction, policymakers might ask whether the policy empowers or disempowers members of the community.⁹⁶ The federal subsidy for local education via this deduction arguably helps foster a populace that is sufficiently educated to be full, productive members of the democratic community.⁹⁷ But because it comes in the form of a deduction based on local property tax burden, the subsidy amount is determined independent of any of the sorts of considerations that would need to be taken into account to address educational goals, which makes the subsidy seem ill-targeted.⁹⁸

Further, this kind of tax policy—allowing some people a deduction that others are not able to claim—can skew the extent to which individuals can exercise free choice. The deduction for state and local taxes acts as a gateway to allowing (some) taxpayers to take a deduction for charitable contribu-

93. See, e.g., John G. Augenblick et al., *Equity and Adequacy in School Funding*, FUTURE CHILD., Winter 1997, at 63; Katherine E. Baird, *Federal Direct Expenditures and School Funding Disparities, 1990–2000*, 33 J. EDUC. FIN. 297 (2008); Black, *supra* note 80.

94. See, e.g., FRANK CUNNINGHAM, THEORIES OF DEMOCRACY 35–36 (2002).

95. Sugin, *supra* note 14, at 661.

96. Abreu, *supra* note 79, at 7 (“[T]ax policy must analyze the ways in which tax systems empower and must identify who they empower.”).

97. See AMY GUTMANN, DEMOCRATIC EDUCATION 67, 139–48 (rev. ed. 1999).

98. That is, how much a school district benefits from a federal subsidy should not depend on the property values and the income of individual property owners in that district.

tions.⁹⁹ This means that, in addition to the effects on education funding and schools, an uncapped deduction for local property taxes would actually empower taxpayers in Birmingham—more of them could take itemized deductions in excess of the standard deduction—to then choose between paying federal income tax *or* making deductible charitable contributions,¹⁰⁰ giving them a menu of options that is available to far fewer taxpayers in Eastpointe.¹⁰¹

Professor Abreu identifies two types of power that the income tax system bestows: avoidance power, whereby a taxpayer is provided mechanisms to pay tax or avoid paying tax, and burden power, whereby a taxpayer has mechanisms to shift the burden of a tax to other taxpayers.¹⁰² Well-off taxpayers—think Birmingham—benefit from both types of empowerment through existing tax rules. On the other end of the spectrum—think Eastpointe—taxation may particularly impair the less well-off, because, in addition to lack of economic power, design of tax provisions denies them autonomy in their interaction with the government.¹⁰³

Transparency in the respects described above—what the law actually does, directly and indirectly, and who it empowers or disempowers—is only one piece of the sort of transparent tax policy apparatus that would give rise to real accountability. For lawmakers to be accountable for the laws they have made, there must also be mechanisms to reveal *who* has promoted particular provisions and why they have done so. A new sort of accountability-focused version of tax policymaking could demand that tax provisions be rationally and reasonably justified contemporaneously by the legislators.¹⁰⁴

Consider how tax legislating might proceed with strong accountability-forcing framework legislation in place.¹⁰⁵ For example, what if a member of

99. This is because taxpayers only benefit from itemizing their deductions if their itemized deductions sum to more than the standard deduction. Local property taxes are often an important portion of the expenditures required to exceed the standard deduction amount.

100. For itemizers, either action allows the taxpayer to “satisfy their financial obligations to society.” ZELENAK, *supra* note 36, at 7.

101. See Sugin, *supra* note 14, at 629–51 (describing a large category of taxpayers who are “legally invisible” and are disempowered by the tax system in myriad respects); *supra* notes 90–92 and accompanying text.

102. Abreu, *supra* note 79, at 12.

103. See, e.g., Repetti, *supra* note 37, at 1132; Mildred Wigfall Robinson, “Skin in the Tax Game”: *Invisible Taxpayers? Invisible Citizens?*, 59 VILL. L. REV. 729, 734–35, 749–50 (2014) (describing the challenge of nonwhite taxpayers bearing the burden of regressive taxes but receiving little if any recognition for it—i.e., they are “invisible”).

104. See generally SUSAN ROSE-ACKERMAN ET AL., DUE PROCESS OF LAWMAKING 55–74 (2015) (describing that U.S. courts do not probe the types or quality of inputs in the legislative process, nor do they consider which interest groups were able to influence the enactment).

105. This framework legislation could look like the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, which provides a process for Congress to establish and agree upon a budget, which annual appropriations bills must then adhere to. Or it could take the form of a special procedural rule. See, e.g., H.R. Rules, 116th

Congress who wanted to eliminate the cap on state and local tax deductions was required to explain her reasons for supporting the provision? As a matter of democratic accountability, this explanation might include references to actual analysis of what the provision would do, and it might reveal the interest groups that sought to support (or oppose) enactment. In a legislating environment where each provision was supported by this sort of explanation and record, the legislative history would detail how the state and local tax deduction benefits people in (or not in) each representative's own congressional district; the record would show how those benefits compare to other education benefits flowing to that district and elsewhere. It would show who was spending money to support or oppose the provision, and who was taking meetings with those advocates.¹⁰⁶

These may feel like bizarre considerations for the political process of enacting tax laws.¹⁰⁷ But what if? Introducing a framework for democratic accountability for legislative tax policymaking, extending it to executive branch tax administration, and considering empowerment effects in both areas might address—and avoid in the future—some of the critiques that were flung at the 2017 Tax Act. Opponents of the legislation complained that it was not subject to nearly the same degree of legislative scrutiny as previous significant tax legislation.¹⁰⁸ This apparent lack of attention by Congress (along with the substance of the law enacted) facilitated the perception that the substance was determined by special interest groups, at regular people's expense. And provisions that empowered some—for example, the section 199A deduction¹⁰⁹—seemed to highlight the lack of empowerment for others.

Democratic accountability could take on different mechanics in different contexts. With federal legislative enactments, democratic accountability might require transparency (along the lines described above, but not limited to that) and procedural protections for potentially marginalized groups of

Cong., Rule XIII, cl. 3(h), at 27 (2019) (requiring Joint Committee on Taxation analysis of any bill reported out of the Ways and Means Committee).

106. Indeed, Congress recognized the necessity of good information in tax policymaking by creating and sometimes relying on the expert staff of the Joint Committee on Taxation. See Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 196–203 (2017) (describing the role of the staff of the Joint Committee on Taxation in the legislative process, in contrast with other legislative committee staff).

107. Another possibility is to focus on the regulatory process. See generally RAHMAN, *supra* note 34, ch. 7 (discussing reforms to democratize regulatory policymaking). But see Wallace, *supra* note 106, at 216–30 (describing the tax regulatory process as especially insulated from productive public input, and showing limited public participation in the notice-and-comment process for proposed tax regulations).

108. See, e.g., Jacob Leibenluft & Chye-Ching Huang, *GOP Process Designed to Obscure Tax Plan's Effects*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 28, 2017), <https://www.cbpp.org/research/federal-tax/gop-process-designed-to-obscure-tax-plans-effects> [<https://perma.cc/M2UQ-F8B4>].

109. I.R.C. § 199A (2012 & Supp. V 2018) (allowing a deduction for income derived from certain businesses organized as “pass through” entities).

taxpayers; in localized tax policymaking, it might require or allow for “public control” by way of ballot measures and other forms of direct democracy.¹¹⁰

Accountability is just the beginning of a different way to approach the tax justice issues that Walsh and Infanti present. Relying on democratic values can start to shape a lens of analysis that has not generally been included in tax policymaking, but can do so in a way that embodies values that are not unique to the realm of tax policymaking.

CONCLUSION

Walsh and Infanti make clear that a variety of socially toxic, if perhaps technically subtle, provisions have long existed in our tax laws, “hiding in plain sight,” to use Walsh’s description. Tax benefits have accrued overwhelmingly to white property and business owners; the nonmarket work of many women and some men has been devalued; heteronormativity is a common thread throughout the Code; racial segregation and educational inequity have been subsidized; the already powerless were further disempowered. For too long, too many tax scholars and policymakers have disregarded or missed these many problems.

The significant battles and victories for social progress in the United States over the past century have been fueled at times by the obviousness of the injustice. Elderly people living in poverty gave rise to the Social Security system;¹¹¹ bread lines prompted federal food assistance;¹¹² Hoovervilles led to federal housing programs;¹¹³ firebombings and lynchings and firehoses turned on peaceful protestors prompted enactment of the civil rights acts of the 1960s and the Voting Rights Act.¹¹⁴ Exposing these injustices was, in each instance, a meaningful step toward legal reforms to eliminate the injustice.

But many domestic injustices that persist today are more veiled, and many are propagated through the federal tax code and through state and local tax structures in the form of race- or gender- or class-neutral provisions with disparate impacts. Disparate impact discrimination can make for less compelling social narratives and less obvious social policy responses than

110. See Kleiman, *supra* note 34 (discussing mechanisms for establishing democratic accountability in state and local tax policymaking).

111. Gary V. Engelhardt & Jonathan Gruber, *Social Security and the Evolution of Elderly Poverty* 2–5 (Nat’l Bureau of Econ. Research, Working Paper No. 10466, 2004).

112. See Ian Shapira, *Food Stamps May Become Like Blue Apron. In the Great Depression, They Started with Blue Coupons.*, WASH. POST (Feb. 13, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/02/13/food-stamps-may-become-like-blue-apron-in-the-great-depression-they-started-with-blue-coupons/> (on file with the *Michigan Law Review*).

113. *HUD Official Reflects on Department’s 50-Year History*, ABA (May 22, 2015), https://www.americanbar.org/news/abanews/aba-news-archives/2015/05/hud_official_reflect/ [<https://perma.cc/QF3R-GVXW>].

114. See Louis Menand, *The Color of Law: Voting Rights and the Southern Way of Life*, NEW YORKER (July 1, 2013), <https://www.newyorker.com/magazine/2013/07/08/the-color-of-law> [<https://perma.cc/XH5W-7GXQ>].

disparate treatment. These disparate impact injustices are more challenging to diagnose and more difficult to instill in the public eye as a persisting problem. And injustices perpetrated through the tax code are especially challenging; as one commentator described, tax policy is an environment in which “a simple accumulation of technical detail is itself capable of assuming a political significance.”¹¹⁵

Walsh’s and Infanti’s contributions help illuminate extant injustice in our tax laws. Broadening our shared conception of taxpayer status and the reach of the tax system to include consideration not just of U.S. federal income taxes but also of the burdens of property taxes borne by renters, sales taxes, fee-based revenue, and so on would allow us to deploy taxpayer status more positively.¹¹⁶ Prescribing policy fixes is an even more formidable task, but that task can and should be guided and aided and facilitated by our shared democratic values.

115. JOHN SNAPE, *THE POLITICAL ECONOMY OF CORPORATION TAX* 32 (2011).

116. This possibility is consistent with Zelenak’s work, *see supra* note 36, though Walsh gets to this point by a very different route.

