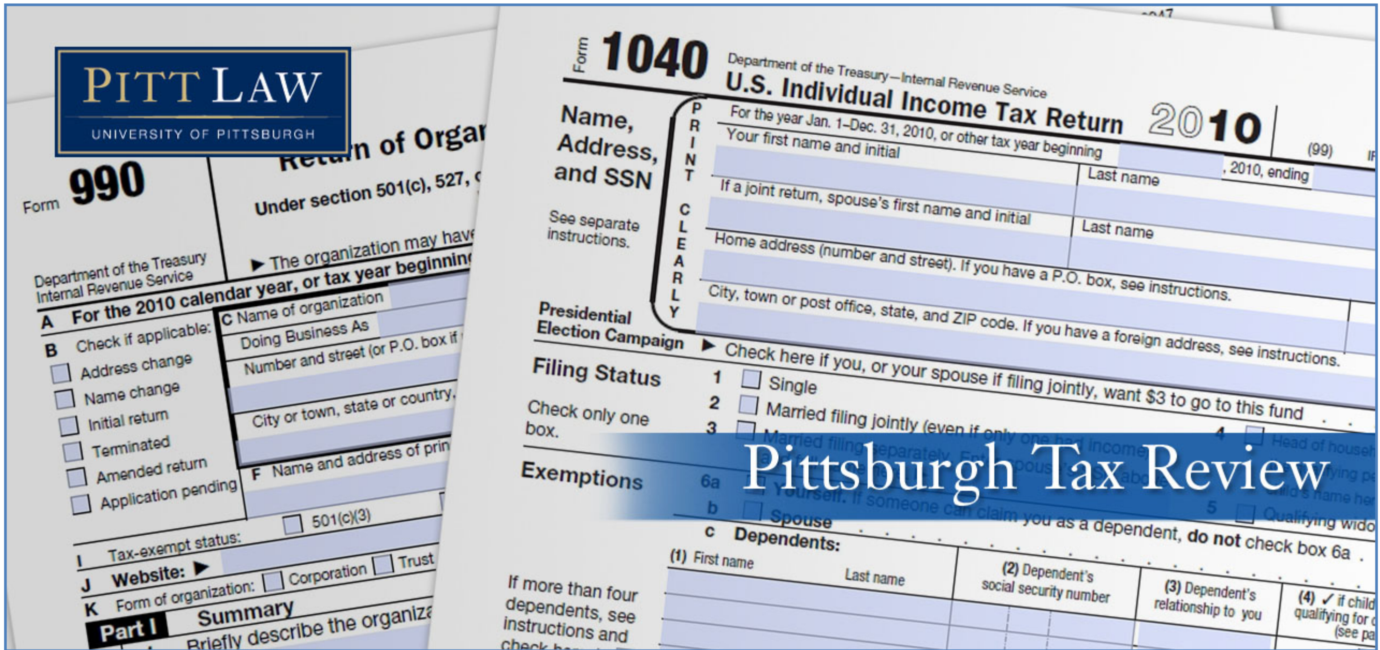

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THE ESTATE TAX, INEQUALITY, AND THE PROBLEM OF PUBLIC CHOICE

Carla Spivack

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THE ESTATE TAX, INEQUALITY, AND THE PROBLEM OF PUBLIC CHOICE

Carla Spivack[*]

I. INTRODUCTION

I am honored by the opportunity to comment on these three fascinating papers, and I thank these scholars for their important contributions to the question of the estate tax and inequality. Each sheds light on important ways the current estate tax contributes to wealth inequality, and therefore to the political, social, educational, health, and all the other intersecting inequalities that plague American society today.[1] The various features of the estate tax

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[*] Carla Spivack is Justice David Josiah Brewer Distinguished Professor of Law at Albany Law School. I would like to thank the *Pittsburgh Tax Review* for giving me the opportunity to write this commentary, and all the participants at this exciting and stimulating conference, especially my wonderful colleagues, Bridget Crawford, Tony Infanti, Allison Tait, and Phyllis Taite. I would also like to thank Philip Hackney for his insightful suggestions, and my colleague Andrew C. Spiropoulos for his support and advice.

[1] On overall inequality, see David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES (Mar. 29, 2007), https://www.nytimes.com/2007/03/29/business/29tax.html (reporting statistics based on 2005 data); *see also* JULIA B. ISSACS, ISABEL V. SAWHILL & RON HASKINS, GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 27–29, 48 (2008) (reporting that income and wealth inequality have been increasing since the 1970s and noting that concentration of assets at the top of income distribution has been growing since at least 1989); Dave Gilson & Carolyn Perot, *It's the Inequality, Stupid*, MOTHER JONES (Apr. 2011), https://www.motherjones.com/politics/2011/02/income-inequality-in-america-chart-graph/ (overviewing economic inequality in the United States).

For political inequality, see John D. Griffin & Brian Newman, *One Person, One Vote?—Why Citizens' Votes Carry Unequal Weight Despite* Baker *and How It Matters*, 62 CASE W. RES. L. REV. 1079, 1107, 1081 (2012) (citing LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 257–67 (2008) (providing and discussing statistics on members of congress's responsiveness to various groups)); JOHN D. GRIFFIN & BRIAN NEWMAN, MINORITY REPORT: EVALUATING POLITICAL EQUALITY IN AMERICA 64–69, 80–85 (2008) (discussing various groups in relation to policy outcomes and members of congress responsiveness); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 793–94 (2005).

For social inequality, see Mark S. Kende, *Foreword: Constitutionalism and the Poor*, 60 DRAKE L. REV. 967, 967 (2012) (citing Joseph Tharamangalam, *Occupy Wall Street: Poverty and Rising Social Inequality, Interrogating Democracy in America*, CTR. FOR RES. ON GLOBALIZATION (Dec. 13, 2011) (discussing statistics of the rising social inequality as an impetus for the Occupy Wall Street

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these papers describe entered the Internal Revenue Code (Code) or trust law either through the disproportionate influence of the "one percent" of the wealthy and the bankers and tax planners who serve them—such as in the case of the Asset Protection Trusts of Professor Allison Tait's article, *Tax Free and the Offshore Imaginary*,[2] and the dynasty trusts Professor Eric Kades describes, in *One Trust, Two Taxes*[3]—or through the utter lack of influence of the racially and economically marginalized—as Professor Taite shows in her article, *Welfare v. Wealthfare: The Illusion of Equality in Tax Policy*.[4] These three articles indicate that something very undemocratic is going on in the creation of tax law. This undemocratic phenomenon seems to confirm the insights of public choice theory regarding interest group power over legislation, and it does seem to fit that model. Ultimately, however, I suggest that public choice theory need not be the final word in this discussion. Rather, I discuss some of its flaws and gaps, and suggest forms of collective

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movement) (https://www.globalresearch.ca/occupy-wall-street-poverty-and-rising-social-inequality-interrogating-democracy-in-america).

For educational inequality, *see, e.g.*, GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 29–21 (2006) (describing inequalities in our public education system, especially with respect to minority students living in concentrated poverty); ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS 135–90 (2015) (describing the inequalities and disparate opportunities that exist in our educational system); LINDA DARLING-HAMMOND, CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 77–79 (Prudence L. Carter & Kevin G. Welner eds., 2013) (describing the inequalities present in our education system).

On health inequality, *see, e.g.*, Dayna Bowen Matthew, *Structural Inequality: The Real COVID-19 Threat to America's Health and How Strengthening the Affordable Care Act Can Help*, 108 GEO. L.J. 1679, 1680 (2020); Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1651–53 (2011); Gwendolyn Roberts Majette, *Striving for the Mountaintop—the Elimination of Health Disparities in a Time of Retrenchment (1968–2018)*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 145 (2020); Raj C. Shah & Sarah R. Kamensky, *Health in All Policies for Government: Promise, Progress, and Pitfalls to Achieving Health Equity*, 69 DEPAUL L. REV. 757, 759–60 (2020); Ole Otterson et al., *The Political Origins of Health Inequity: Prospects for Change*, 383 LANCET 630, 630 (2014); Rachel Thornton et al., *Evaluating Strategies for Reducing Health Disparities by Addressing the Social Determinants of Health*, 35 HEALTH AFF. 1416, 1416 (2016); Wendy Netter Epstein, *The Health Equity Mandate*, 9 J.L. & BIOSCIENCES 1, 53 (2022) ("[W]ide agreement exists that social determinants contribute significantly to health disparities.") (citing Mary Crossley, *Black Health Matters: Disparities, Community Health, and Interest Convergence*, 22 MICH. J. RACE & L. 53, 61 (2016)).

[2] Allison Tait, *Tax-Free and the Offshore Imaginary*, 20 PITT. TAX REV. 313 (2023).

[3] Eric Kades, *One Trust, Two Taxes*, 20 PITT. TAX REV. 341 (2023).

[4] Phyllis C. Taite, *Welfare v. Wealthfare: The Illusion of Equality in Tax Policy*, 20 PITT. TAX REV. 363 (2023).

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action that can be marshalled to respond to the phenomena these articles present.

In Part II, I summarize the three articles on this panel, drawing out their common theme: the shaping of important features of the estate tax and the trusts used to avoid it by the outsized influence of small constituencies and the complete lack of influence by any other, much larger, constituencies whom these features harm. I summarize the disparate impact of the estate tax on minorities and the middle and working class that Professor Taite describes, and offer it as an effect of the lack of any interest group lobbying for these demographic groups. I explain how the disparate impact of many features of the estate tax on minorities and the middle and working class sits at the opposite end of the spectrum as the result of the lack of any interest group to lobby for these interests.

Part III applies public choice theory to the tax legislation process in general, summarizing others' important work in this space, and pointing out both federal tax law's susceptibility to interest group lobbying and giving examples of its operation.

Part IV poses the problem public choice theory presents for democratic decision making in a Republic founded on the rejection of taxation without representation. I offer reasons tax legislation so often fails to inspire popular engagement at any level more granular than vague misconceptions about the estate tax. I then revisit others' critiques of public choice theory that lead to strategies for counteracting lack of engagement in this area of law making.

II. Offshore, Onshore, and Everywhere Else

In answering the question this conference poses—does the estate tax contribute to wealth inequality—these three articles answer with a resounding, "*Yes, and this is how*." Each of these three articles investigates features of the estate tax that operate outside of public view, contribute to wealth inequality, and unfairly skew the tax burden. The first two features—the offshore and onshore asset protection trusts and dynasty trusts—hollow out the estate tax by creating devices—usually some form of trust—for those who would otherwise pay the most to pay less, or nothing at all. The third—the disparate impact of the estate tax on minorities and working families—also presents a maldistribution of the tax burden. If the point of the estate tax is to break up dynastic wealth and redistribute resources—and I will argue

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that history supports this view—it certainly is not working. These three papers help explain this failure.

Allison Tait's article *Tax-Free and the Offshore Imaginary*,[5] begins with a quote describing the offshore tax havens that are the subject of the piece as "a capitalist archipelago of free trade zones, offshore banks, tax havens, bought citizenship, and other states of exception."[6] Carl Schmitt, the philosopher of exception (Ausnahezustand), defined the phrase "state of exception" as referring to a state of emergency in which, because of a catastrophic event or social crisis, laws were suspended and all power became lodged in the sovereign.[7] In Schmitt's view, the legal order itself would ideally provide for a state of exception, as did the Weimar Constitution, but if not, a "sovereign" would reveal himself by taking power and imposing martial law to address the situation.[8] The connection Tait makes here is that these offshore islands are territories where tax law has, paradoxically, undone itself—carved out a space in which it is absent, succumbed to the loophole in its own constitution. Here, Tait points to an important connection: what Schmitt's state of exception and the offshore tax havens share is that they are both the products of the law itself.[9] Both are situations in which the law's own mechanisms allow for its undoing.

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[5] The term "imaginary" refers to a concept developed by the psychoanalyst Jacques Lacan. It refers, on the individual level, to a person's vision of the self as a coherent, unified whole, while in fact the actual physical experience of the self is one of fragmentation and incompleteness. More relevant to Tait's article is the social imaginary, a realm which allows individuals to imagine themselves as a part of unitary and perfect communities, while the reality of any real-life community is ultimately one of fragmentation and fracture. Tait seems to be suggesting that these offshore realms allow for the fantasy of a perfect community, where the self experiences no limitations or boundaries—in this case, limitations embodied by the constraints of "onshore" governance and regulation. For a full discussion of Lacan's concept of the imaginary, see Ellie Ragland, *Lacan and the Subject of Law: Sexuation and Discourse in the Mapping of Subject Positions That Give the Ur-Form of Law*, 54 WASH. & LEE L. REV. 1091 (1997).

[6] Tait, *supra* note 2, at 313 (citing Mimi Sheller, *Caribbean Futures in the Offshore Anthropocene: Debt, Disaster, and Duration*, 36(6) ENV'T & PLAN. D: SOC'Y & SPACE 971, 976 (2018)).

[7] For a fuller discussion of Schmitt's ideas, see Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1826–27 (2000).

[8] *Id.*

[9] *Id.* at 1835 (explaining that in Schmitt's paradigm, "It is the existing, ordinary, legal order that defines the circumstances under which resorting to a dictatorship may be necessary").

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As in colonial times, Tait observes, the islands offer "solitary and unregulated spaces" where the wealthy can create their own worlds, escaping burdensome regulations and governmental intrusions.[10] These offshore financial centers include the Channel Islands, Isle of Man, Malta, Cayman Islands, British Virgin Islands (BVI), The Bahamas, Bermuda, Vanuatu, Cook Islands, Mauritius, and Seychelles.[11] (While beyond the scope of Tait's article, it is worth noting that, as Steven Dean has pointed out, some of the most significant tax havens are not tropical islands, but rather include many European countries, such as Switzerland).[12] These tax havens all offer "banking secrecy, low tax regimes, responsive legislatures, and political stability.[13] A key benefit these sites offer is the ability to use trusts to protect the assets of the settlor from her own creditors. While the common law of trusts allowed a settlor to place assets into a trust to shield them from a third-party beneficiary's creditors, these "asset protection trusts" allow a settlor to place her assets in trust to prevent her own creditors from reaching them.[14] As Tait explains, "traditional trust law requires trust settlors to surrender control of the assets in trust in order to receive asset protection. Trust settlors wanted, however, to have it both ways and be able to control the assets in trust . . . and also receive traditional asset protection."[15] Offshore trusts allow for this set-up.[16] Such barred creditors may be lenders or business partners; they may also be tort or fraud victims seeking to satisfy damages awards, or spouses seeking court-ordered support.

Customers who find these trusts appealing may also be those who commit fraud under U.S. law—Ponzi schemers, real estate scam artists—or those in professions subject to a high degree of risk for litigation, such as

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[10] Tait, *supra* note 2.

[11] *Id.* at 316.

[12] *See, e.g.*, Steven Dean, *A Plea to President Biden to Stop Perpetuating Racist Tax Policy*, THE NATION (Apr. 13, 2021), https://www.thenation.com/article/economy/biden-tax-policy/ [https://perma.cc/PYU6-T2HD].

[13] Tait, *supra* note 2, at 315.

[14] *Id.* at 326.

[15] *Id.* at 322-23.

[16] *See* Alaska Stat. § 34.40.110(b)(4) (1997) (with limited ability to child support orders to reach trust assets, but protecting trust assets from spousal support).

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doctors fearing malpractice awards.[17] An additional appeal for many prospective trust settlors is that these trusts may be able to avoid U.S. taxation.[18]

As Tait explains, the offshore has spilled onshore: inspired to compete with the offshore purveyors, U.S. states raced to adopt similar financial instruments to attract domestic business.[19] First Alaska, then Delaware, followed by many others, created "trusts that allowed the settlor to be a beneficiary and even a trustee of an irrevocable trust and still obtain the asset protection features long associated with discretionary spendthrift trusts, a development at total odds with conventional trust rules for asset protection."[20] As of this writing, twelve states have adopted Domestic Asset Protection Trusts (DAPTs or APT) that offer the same protections from creditors that the offshore jurisdictions have done for decades.[21]

In tracing the movement of offshore tax lawlessness to onshore locations in the United States, Tait's article provides a segway into Eric Kades' presentation about dynasty trusts. In *One Trust, Two Taxes*, Kades takes on the dynasty, or perpetual trust, born of the repeal of the rule against perpetuities in many states. This repeal allowed trusts to last longer than the

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[17] *See generally* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 14–15 (1994) (noting OAPTs may be used to defeat principles of United States trust law, such as the precept "that one ought not control and benefit from property and at the same time shield it from one's creditors").

[18] Although the passage of the Foreign Account Tax Compliance Act in 2014 significantly increased reporting and compliance of offshore accounts with regard to United States taxes, it still left avenues open for tax evasion. *See* MAJORITY & MINORITY STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFS., 113TH CONG., OFFSHORE TAX EVASION: THE EFFORT TO COLLECT UNPAID TAXES ON BILLIONS IN HIDDEN OFFSHORE ACCOUNTS 6–8 (2014).

[19] Brendan Duffy, Note, *In States We "Trust": Self-Settled Trusts, Public Policy, and Interstate Federalism*, NW. U. L. REV. 205, 217 (2016) (tracing the Alaska DAPT legislation to "[t]rust attorneys in Alaska who noticed the flight of capital to offshore jurisdictions [and] created the first domestic asset protection trust law, thinking that by enacting a domestic asset protection trust, they could capture at least a small slice of the self-settled trust market") (citing Douglas J. Blattmachr & Jonathan G. Blattmachr, *A New Direction in Estate Planning: North to Alaska*, 136 TR. & ESTS. 48, 48 (1997)); *see also* John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41, 53–54 (2000) (quoting Alaska legislator as wanting to benefit from trust money that was going to offshore jurisdictions).

[20] Tait, *supra* note 2.

[21] Currently, seventeen states have some form of Asset Protection Trusts. For a list, see Cherish D. Van Mullem, *Shield Assets Kept Nearby with Asset Protection Trusts*, 45 EST. PLAN. 32, 33 (2018).

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common law limit of a "life in being plus 21 years." This change, combined with Congress creating an exclusion from the gift tax, originally of one million, during life or one and a half million at death, both subject to incremental increases over time,[22] from the estate tax, started fierce inter-jurisdictional competition for trust business.[23] States began to allow trusts to last for hundreds of years either without paying taxes on trust income or creating a taxable event upon distribution to beneficiaries.[24]

Kades aptly notes the dangers of this kind of wealth accumulation: its "potential . . . to create a new, hereditary nobility in the United States [that] will reinforce already formidable forces that are increasing inequality and fraying the social fabric."[25] Kades asserts that the best solution would be a national one and proposes the only kind of trust-related legislation that could be national—a tax law. Kades proposes Congress pass a law that would penalize with stiff taxation each trust in excess of one established for a particular "bloodline."[26] Under his regime, each "bloodline" would retain current tax treatment on its first dynasty trust, and then impose what he calls a "dynastic wealth externality tax" on any further trusts.[27] A number of questions arise regarding Kades' proposal: for example, how does one define "bloodline" for tax purposes? As Bridget Crawford and others have noted, the IRC itself defines the family for tax purposes in varying and sometimes contradictory ways throughout the Code.[28] Even more complicated would be the question of what constitutes "one" trust. For example, what if a trust had a decanting clause that allowed it to be decanted into two or more separate

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[22] The exemption schedule increases as follows: through 2003, $1 million; in 2004 and 2005, $1.5 million; in 2006 through 2008, $2 million; and in 2009, $3.5 million. 26 U.S.C.S. §§ 2631(c), 2010(c) (LexisNexis 2005).

[23] The leading study of the states' competition for trust assets through both asset protection trusts and perpetuities reform is Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

[24] *Id.* at 371–72.

[25] Kades, *supra* note 3, at 345.

[26] *Id.*

[27] *Id.*

[28] Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 32 (2005).

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trusts—or even one, new trust? Would the original trust count as one? What would be the effect of the new decanted trust or trusts many years in the future? Despite these questions, however, Kades makes two important points: first, the dynastic and asset protection trust issue is complicated because both fall under state, not federal law, making them more challenging to address in a comprehensive way. And he makes explicit a point Tait also suggests in her paper: the fact that wealth concentration has externalities that fall on others—inhabitants of offshore islands or middle-income American taxpayers. What is this externalized cost, and can the law make the 1% internalize it?

Both the offshore/onshore APTs Tait describes, and the dynasty trusts of Kades' article contribute to wealth inequality in various ways. Most obviously, they skew the tax burden: by allowing the super-wealthy to avoid taxes, they shift the tax burden to those less able to pay it. This is inequitable, and it violates a fundamental principle of tax law—vertical equity, the idea that those with more wealth pay more in taxes.[29] These trusts exacerbate wealth inequality in other ways as well: by avoiding their fair share of the tax burden, they opt out of the wealth redistribution for which the estate tax was designed. And they deplete the public fisc, depriving the financially marginalized from tax-funded public goods that would help them acquire wealth, such as education, job training, healthcare, and many others.

Professor Phyllis Taite takes us to the other end of the wealth spectrum: she outlines ways the U.S. tax code, specifically the estate tax, often places a heavier tax burden on minorities, in particular Black Americans, and on middle- and lower-income communities, than on the wealthy. She thus presents the other half of the influence story: this is the demographic that bears the weight of the skewed tax burden, part of the externality she and her co-panelists describe. To explain how this works, Taite identifies what she calls "four of the pillars of wealth mobility: inherited wealth, education, homeownership, and acquisition of appreciating assets."[30] These "pillars" support intergenerational wealth accumulation by passing wealth from one generation to the next; Taite shows that the tax treatment of these three forms

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[29] *See, e.g.*, David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 51 (2006) (discussing the concept of vertical equity).

[30] Taite, *supra* note 4, at 364.

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of assets has consistently favored the wealthy and disfavored those in lower economic classes, and specifically, Black Americans.[31]

Specifically, homeownership brings tax benefits to heirs in the form of the stepped-up basis; the assumption that the taxation of retirement distributions in a lower tax bracket will benefit retirees ignores those whose employment earnings keep them in the same bracket. Finally, the reduced tax rates on capital gains—particularly long-term gains—allow those with investment income, as opposed to wage income, to pass on a greater proportion of their wealth to their descendants.[32] Taite also notes, however, that the government does not collect race-based data on taxpayers, a major deficit in analysis that, she argues, obscures the racial inequity of the tax burden.[33]

These three articles invite us to think more broadly about the externalities that stem from an inequitable distribution of the tax burden. Kades lists the many social harms of the tax avoidance and concomitant social inequality enabled by the dynasty trust and suggests an "externality tax" on those trusts to pay for it.[34] Tait brings into view the externality of the poverty of the indigenous people on the offshore islands that offer tax havens to the "onshore" wealthy. She notes, for example, that, not only do the island's trust and banking businesses usually fail to bring prosperity to those who live there, but these industries also have a "'crowding out' effect, in which the financial services industry takes up all the resources available, leaving little space or support for other industries."[35] Taite also asks us to think more broadly about the externalities of an unfair distribution of the tax burden on racial wealth inequality.[36]

Finally, and this is my focus here, each article illuminates a particular distortion in the public's influence on the Code—or the absence of that influence. This theme brings me to public choice theory. In Part III, I discuss

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[31] *Id.*

[32] *Id.* at 387.

[33] *Id.* at 365.

[34] Kades, *supra* note 3, at 347.

[35] Tait, *supra* note 2, at 333.

[36] Taite, *supra* note 4.

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the history of the estate tax and the mission with which it was conceived—that of preventing the intergenerational accumulation of wealth in a few families. I then turn to public choice theory to show how the economics of legislative influence have undermined the tax's historic mission. In Part IV, I discuss critiques of public choice theory and suggest ways democratic collective action could affect tax law.

III. PUBLIC CHOICE AND THE PURPOSE OF THE ESTATE TAX

Although the estate tax began as a fundraising measure during wartime,[37] by the turn of the century, its acknowledged purpose was to break up large family fortunes and redistribute wealth.[38] This agenda reflected the spirit of the Progressive Era: Theodore Roosevelt, in his 1906 State of the Union address to Congress, said:

> I feel that in the near future our national legislators should enact a law providing for a graduated inheritance tax by which a steadily increasing rate of duty should be put upon all moneys or other valuables coming by gift, bequest, or devise to any individual or corporation . . . .
>
> [T]he prime object should be to put a constantly increasing burden on the inheritance of those swollen fortunes which it is certainly of no benefit to this country to perpetuate.[39]

Colloquially, this was called "trust busting," and was a popular cause in this era.[40] Roosevelt, however, did not live to see the birth of the estate tax; that had to wait until World War I created an urgent need for funds to modernize the military, and President Wilson signed into law a large tax bill that included the precursor to the today's estate tax.[41] Though the estate tax

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[37] David Frederick, *Historical Lessons from the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197, 198 (2007) ("Somewhere in [the estate tax's] eighty-five year life, it became widely acknowledged that the estate tax had lost its revenue raising rationale and had become justifiable primarily as a tool for preventing the continuation of exorbitant wealth within a family by collecting a large share of taxes from any estate over a specified value.").

[38] *Id.* at 204.

[39] *Id.* at 204 (citing Pres. Theodore Roosevelt, State of the Union Address (Dec. 3, 1906)).

[40] *Id.* at 216 (citing Lewis L. Gould, *The Republicans Under Roosevelt and Taft*, *in* THE PROGRESSIVE ERA 63 (Lewis Gould ed., 1974)).

[41] Frederick, *supra* note 37, at 205; *see also* Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756.

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was passed as a wartime measure, the progressive atmosphere of the times suggests that many saw it as a wealth redistribution method as well.[42] Indeed, after the war, Treasury Secretary Andrew Mellon argued for the end of the estate tax, stating that the "social necessity for breaking up large fortunes in this country does not exist."[43] In 1924, however, a progressive Congress ignored him, and, instead of ending the estate tax, enacted a higher one, and added the gift tax as a backstop to prevent its evasion through lifetime transfers.[44] Although Congress retreated a step in 1926 by returning the tax to its pre-1924 rate, thus reducing its revenue-raising utility, this seemed to reinforce the tax's wealth-leveling role.[45] But in the 1950s, the estate tax's contribution to overall revenue shrank, and its role as wealth leveling device again became explicitly dominant.[46] In 1950, Representative Robert Kean stated before the Ways and Means Committee that he approved of the tax, "entirely on the basis of the social benefit in preventing the piling up of too big estates;" a sentiment he repeated in 1951 by saying, "[the estate tax] was not chiefly for the production of revenue, but rather for a social benefit, in order not to allow these great piles of capital to grow and grow."[47] Twenty-five years later tax analyst Gerald R. Jatscher wrote, "[i]n my opinion the one aim of a death tax that stands scrutiny is its redistributive or anti-concentration aim . . . . [A] properly designed, well administered progressive tax on inheritances ought to be an effective means for leveling wealth."[48]

Public choice theory perches uneasily on the continuum that runs from realism to cynicism. It uses economic analysis to describe and predict

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[42] Frederick, *supra* note 37, at 205 (citing RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 108 (1954)).

[43] *Id.* at 206 (citing ANDREW W. MELLON, TAXATION: THE PEOPLE'S BUSINESS 123 (1924)).

[44] *Id.* (citing Revenue Act of 1924, 43 Stat. 253 (1924)).

[45] *Id.* (explaining how the estate tax's revenue-raising role has been resurrected at various points in American history. The Great Depression and World War II saw dramatic reductions in the exemption amount, increased rates, and the reinforcement of the gift tax).

[46] *Id.* at 207 (citing Gerald Jatscher, *The Aims of Death Taxation*, *in* DEATH, TAXES AND FAMILY PROPERTY 40 (Edward C. Halbach ed., 1977)).

[47] *Id.* at 207–08 (citing Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223 (1955)).

[48] Jatscher, *supra* note 46.

legislative outcomes.[49] Its basic premise is that legislation is drafted in response to the influence of interest groups on legislators and public agencies, and that an economic model can predict which groups will win in the contest to shape a particular piece of law making.[50] One scholar summarizes it as follows: "Public choice theory rests on the assumption that individual voters, interest groups, and politicians act rationally to promote their interests in a transactional political market. Citizens and interest groups engage in a 'quid pro quo process of exchange' that results in 'demand' for particular policies."[51]

Ultimately, this model predicts the group consisting of the smallest number of constituents with the most to lose or gain and the most resources to bring to bear will win.[52] This group will succeed, public choice theory shows, because all members of the group will work hard and deploy resources toward the goal.[53] By the same token, policies that benefit large and diffuse groups will often fail because these groups consist of many people with less individually at stake.[54] Public choice theory has been influential in all areas of law, and tax scholars, like many others, have taken it up as a tool for analyzing tax lawmaking.[55] As the articles on this panel

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[49] The foundational work that laid out the framework for public choice theory is JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962). *See also* Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974). For critique, see DANIEL FARBER & PHILIP FRICKEY, LAW AND PUBLIC CHOICE (1991).

[50] Alan Vestal, *Public Choice, Public Interest, and the Soft Drink Interbrand Competition Act: Time to Derail the "Rootbeer Express"?*, 34 WM. & MARY L. REV. 337, 350 (1993) (explaining PCT's claims to predict outcomes).

[51] Jeremy R. Girton, *The Attorney General Veto*, 114 COLUM. L. REV. 1783, 1793 (2014) (citing DENNIS C. MUELLER, PUBLIC CHOICE 3 (1979)).

[52] *Id.* at 1795.

[53] *Id.*

[54] *Id.*

[55] *See, e.g.*, Clinton G. Wallace, *Democracy Avoidance in Tax Lawmaking*, 25 FLA. TAX REV. 272 (2021); Lilian V. Faulhaber, *Diverse Interests and International Legitimation: Public Choice Theory and the Politics of International Tax*, 114 AJIL UNBOUND 265 (2020); Susannah Camic Tahk, *Public Choice Theory and Earmarked Taxes*, 68 TAX L. REV. 755 (2015); David G. Duff, *The Abolition of Wealth Transfer Taxes: Lessons from Canada, Australia, and New Zealand*, 3 PITT. TAX REV. 71, 72 (2005); Kyle D. Logue, *If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Transition Debate*, 67 U. CHI. L. REV. 1507 (2000).

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show, it seems a perfect description of the way tax laws have been passed over the past few decades. The trouble is, public choice theory's model of the successful interest group—the small, moneyed, highly impacted, group that wins out over larger, less resourced groups—offers an undemocratic paradigm. Such a group, it would seem, will always win over the general public. Seeing the public choice paradigm at work shaping tax law is perhaps especially troubling. As Clinton Wallace points out, for example, American history taught in primary school makes such taxation without popular representation seem counter-intuitive and even un-American.[56]

How did this lack of public engagement—and the defeat of the engaged public—and the victory of small interest groups come about? I suggest there are likely many reasons, not the least being the Byzantine complexity and mind-numbing prose style of the Code itself. These features of tax law, along with various aspects of congressional process, create a perfect atmosphere for special interests to flourish. Thus, public choice theory at its most cynical fits federal tax legislation perfectly. Examples on the ground starkly bear out this intuition. In 2002, proponents of perpetual trusts in Nevada sponsored a popular referendum to overturn the state constitution's ban on perpetuities.[57] Despite their confidence in victory, 60% of the public voted against the proposal.[58] Undeterred by this expression of popular will, however, the Nevada state legislature shortly thereafter passed a bill allowing trusts in the state to last up to 365 years.[59]

The features of the law described in the three articles for this panel are all results, directly or indirectly, of the process public choice theory identifies. The first two, DAPTs and dynasty trusts, are the result of interest group lobbying at both the federal and the state level, and the third, the racially disparate impact of the estate tax, the result of the absence of an

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[56] Wallace, *supra* note 55, at 275 ("American expectations of democratic control are arguably at their zenith when Congress exercises its constitutional power to tax (think: "no taxation without representation") (citing U.S. CONST. art. I, § 8, cl. 1: "The Congress shall have the Power To lay and collect Taxes"); McCulloch v. Maryland, 17 U.S. 316,431 (Marshall, J., 1819) ("[T]he power to tax involves the power to destroy.")).

[57] Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1773 (2014).

[58] *Id.*

[59] *Id.*

impacted group at the negotiating table. As Tait notes, the concept of the APT began "offshore" and then evolved into domestic versions as it inspired imitations stateside. One New York trust attorney in particular, Jonathan Blattmachr, was inspired by these developments to bring about what was arguably the greatest paradigm shift in the history of American trust law.[60] Blattmachr, at the time a partner with the law firm Milbank Tweed, was inspired to break two trust law paradigms: the limited trust duration allowed under the rule against perpetuities of the common law, and the rule that a trust settlor could not place her own assets into a trust to put them out of reach of her own creditors.[61] As Blattmachr stated in a 2016 interview:

> The big hole in using trusts for asset protection was somebody else had to create the trust for you, and you needed asset protection to have estate tax exclusion. So I began to look at these offshore trusts, but I became concerned for many, many reasons, including that I did not think clients would want to have their assets in a place they couldn't find on a map.
>
> So, I said, ''Why not have a jurisdiction in the United States that permits self settled trust?"

Blattmachr, along with his brother, Douglas Blattmachr, a trust company manager, started looking for a home for these paradigm breaking trusts in the United States.[62] Blattmachr began by proposing APTs to the Estate Planning Section of the New York Bar, but was, in his words, "unanimously shot down."[63] But in 1997, Blattmachr was visiting Alaska on a fishing trip with his brother and had the idea that Alaska might be more receptive to the idea of the APT than New York.[64] He and other trust lawyers, including Dick Thwaites, an Alaska estate planning attorney the brothers knew, drafted the *Alaska Trust Company Act*, which the Alaska Legislature passed in 1997.[65] In the same year, Douglas Blattmachr founded the Peak

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[60] Bridget J. Crawford, *On Perpetuities, Paradigms, and a Creative Life in the Law*, TAX NOTES, July 11, 2016, at 289.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 290.

[65] *Id.* ALASKA STAT. § 34.40.110 (1998).

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Trust Company in Alaska which today manages billions of dollars in assets.[66] One reason Alaska was such a good prospect for the DAPTs was that it is one of the states with no income tax, meaning that trust income would not be taxed.[67] When Alaska considered imposing an income tax in 2015, Douglas Blattmachr told the state legislature he would "shutter our business and move to another more favorable state."[68]

The initial passage of the DAPT legislation in Alaska seems like an excellent illustration of the public choice theory of legislation. A small group of experts, each of whom had a strong interest in passing the legislation, worked together to persuade lawmakers to make it law. (Blattmachr explained the choice of Alaska as the first state chosen to try to pass the DAPT law because "Dick [Thwaites] said we could get it through there.")[69] Their success may also have been a product of the relative lack of interest in, and publicity about, tax and trust legislation: as Ray Madoff notes, in her book *Immortality and the Law*, it is easy for these legislative deals to take place behind closed doors because they have little attention grabbing appeal and rarely make headlines.[70] There are large constituencies who might have opposed the Alaska legislation: for example, ex-spouses and children with support orders basically unenforceable against the trusts,[71] and also Alaska taxpayers who are concerned about Alaska becoming a famous tax haven for the out-of-state—and in-state—wealthy without any gain to the state

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[66] *Peak Trust Company Origin and Ownership*, PEAK TRUST CO., https://www.peaktrust.com/resources/faq/peaktrustcompanyoriginownership/ (last visited Feb. 24, 2023).

[67] Jim Probasco, *9 States with No Income Tax*, INVESTOPEDIA (July 19, 2022), https://www.investopedia.com/financial-edge/0210/7-states-with-no-income-tax.aspx.

[68] Kalena Thomhave, *How One Man Helped Make America a Global Tax Haven*, MOTHER JONES (Sept. 30, 2022), https://www.motherjones.com/politics/2022/09/america-tax-avoidance-states-haven-delaware-south-dakota-alaska-nevada-wyoming/.

[69] Crawford, *supra* note 60, at 290.

[70] RAY MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 155 (2011).

[71] Trent Maxwell, *Domestic Asset Protection Trusts: A Threat to Child Support?*, 2014 B.Y.U. L. REV. 477, 497 (2014) (enumerating scenarios under which a settlor could avoid child support under the Alaska statute).

economy[72] in a state with an 11% poverty rate.[73] But, such a constituency would have been extremely difficult to muster and, as public choice theorists point out, would have been under-resourced, too large to exert effective pressure, and plagued with free riders with little urgent perceived stake in the issue.

In the following years, the Blattmachrs became advisors to legislatures all over the country that wanted to institute DAPTs.[74] The dynasty trusts that Professor Kades describes took hold at a similar time, and in the same manner. As I have observed elsewhere:

> Typically, the special interests who stood to benefit from these new trusts control the drafting, introduction and debate about them. For example, the Maine dynasty trust bill passed "after a lopsided debate whose key contributors were members of the banking lobby and attorneys in private practice who stood to gain the most from its passage." Nevada offers another example of this lack of democratic process: when proponents of perpetual trusts in that state held a state-wide referendum to repeal the state constitution's anti-perpetuity provision, voters rejected it by a margin of sixty percent. Nonetheless, the state legislature passed a law—drafted by a committee which included members of a Nevada trusts and estates law firm—allowing trusts to endure for 365 years. In Michigan, the Greenleaf Trust Company, represented by a local law firm, seems to have "spearheaded" the passage of perpetual trusts in that state. According to the webpage of Dykema, a Michigan law firm, one of its partners was the "primary draftsperson" of the domestic asset protection trust legislation passed by the Michigan legislature in December 2016. In Connecticut, local banks and lawyers argued that "people who want to set up dynastic trusts for their grandchildren, great-grandchildren and down the line of generations, are doing them in other states."

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[72] Adam Hofri-Winogradow, *The Statutory Liberalization of Trust Law Across 152 Jurisdictions: Leaders, Laggards and the Market in Fiduciary Services*, 53 U.C. DAVIS L. REV. 2313, 2352 (2020) (summarizing data showing that:

> Law reform specifically designed to provide what some clients want, or are believed to want, and thereby assist service providers to trusts—trustees, attorneys, accountants and others—in attracting and retaining clients, such as reforms allowing self-settled spendthrift trusts and abolishing the rule against perpetuities, does nothing to increase the fees fiduciaries earn per trust, the fees attorneys, accountants and return preparers earn by providing trust-related services, total trust income (less loss), the amount of establishments in the 'trust fiduciary and custody' sector, the amount of employees in that sector or annual payroll in that sector).

[73] *Anchorage, Alaska (AK) Poverty Rate Data*, CITY-DATA.COM (2020), https://www.city-data.com/poverty/poverty-Anchorage-Alaska.html.

[74] Crawford, *supra* note 60, at 291.

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> Indeed, the lawyer who headed the lobbying efforts in the Connecticut Legislature reported that at the hearing on the perpetual trusts bill "a kind of bidding war ensued as legislators extended the time period from 90 to 100 to 360 years, finally ending at a 2000 year period limitations." The New Jersey legislature passed the Trust Modernization Bill overturning the ban on perpetuities which was sponsored by the New Jersey Bankers Association . . . As Sitkoff and Horowitz note, "lawyers and bankers have lobbied for perpetual trusts to attract, or at least retain, trust business."[75]

At the federal level, a small battalion of the wealthiest American families successfully lobbies against the estate tax; the title of CNN's article on the subject inadvertently expressed public choice theory in a nutshell: *Tiny but Powerful: The Estate Tax Lobby*.[76]

If an army of lobbyists and other interested constituents illustrate perfectly public choice theory's economics of law-making, Professor Taite's article shows what lies at the other end of the public choice spectrum: the law that results when large numbers of people across a wide swath of demographics are affected.[77] The result is exactly what public choice theory predicts: laws can pass despite negatively impacting large numbers of people in varying degrees because large groups of people cannot influence legislation nearly as effectively as small groups whose members share identical, high stakes. The group of those harmed is large and diffuse—not just racial minorities, but the majority of middle class and working Americans. This type of interest group has exactly the profile of the group least likely to win at interest group politics in the public choice paradigm. This is a group that is unlikely to be able to muster the resources and the individual sense of urgency to influence legislative reform. This theorem is exacerbated by the centuries-long absence of racial minorities from both the back and front rooms of American lawmaking. The skewed impact of the estate tax on racial minorities is a product not only of public choice theory economics, but also of the exclusion of large numbers of Americans based on race.

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[75] Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311, 331–32 (2017) (internal citations omitted).

[76] Tory Newmyer, *Tiny But Powerful: The Estate Tax Lobby*, CNN MONEY (Dec. 21, 2010, 2:32 PM), https://money.cnn.com/2010/12/21/news/economy/estate_tax_lobby.fortune/index.htm#.

[77] Taite, *supra* note 4.

In some ways, tax is an ideal test case for proponents of public choice theory. First, to most people, tax is complicated and boring. Second, it seems like an area of law especially amenable for lobbying for tailored loopholes: the groups who will benefit from loopholes are small and focused, will experience large amounts of gain, and risk large amounts of loss if they fail. Moreover, the complexity of tax legislation places considerable power in the hands of committee chairs, who in turn are in excellent positions to do favors for wealthy constituents in return for reelection.[78]

To be sure, the complexity of tax law requires some delegation to unelected personnel (in either the executive or the legislative branch) who are positioned to be less responsive to political winds and whose work may be completed outside of public view.[79] But, Congress has considerable in-house expertise in the crafting of tax legislation (the Joint Committee on Taxation is a bicameral and nonpartisan group of tax experts who advise Congress on tax)[80] and these unelected advisors are accountable to elected officials who in turn are accountable to the public. And though public choice theorists defend such delegation as a solution to the problem of closed-door lobbying by special interests in this contentious area,[81] there is no guarantee that experts will be bi-partisan.[82] And, the problem is much worse than lobbying. A common strategy for crafting tax avoidance loopholes is for partners at top accounting firms to take senior jobs at Treasury, where they create rules that enable their former clients to avoid taxes, then return to their firms with raises and promotions.[83] Thus, the question all of these articles raise, I suggest, is: how do we democratize tax lawmaking? That is, can the majority of Americans influence the tax lawmaking process?

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[78] I would like to thank my colleague Andrew Spiropoulos for sharing this insight with me.

[79] Wallace, *supra* note 55, at 291–92.

[80] *Id.* at 293 n.79.

[81] *See generally* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

[82] Wallace, *supra* note 55, at 293.

[83] Stefani Reynolds, *How Accounting Giants Craft Favorable Tax Rules From Inside Government*, N.Y. TIMES (Sept. 19, 2021), https://www.nytimes.com/2021/09/19/business/accounting-firms-tax-loopholes-government.html.

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IV. COLLECTIVE ACTION SOLUTIONS

One thing all these articles make clear is the need for change. Tax is simultaneously urgently important for the public interest, deeply politicized, boring, impenetrable, and obscure. This is a bad combination for democracy. The discrepancy between what people think they know about the estate tax—it is unfair, it forces people to sell their family farms, it takes property from people that is rightfully theirs—and the reality, is huge. Almost nothing in common wisdom about the tax is accurate. I suggest this gap between popular belief and reality is wider at the juncture of tax and succession laws (where estate tax happens) than in any other area of law. These three articles make clear the need for much more transparency, access, and education. These changes, in turn, can lead to greater engagement with the law making process.

First, the Treasury Department must begin gathering, and publicizing, information about race and taxation. This is essential to show the disparate impact of the Code on racial minorities and working families. Throwing light on these statistics would provide a focus for action. In her book, *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans—and How We Can Fix It*[84] Dorothy Brown recounts her mother's reaction to reading the manuscript and realizing how the tax system had taxed her and her husband for both working more than it taxed wealthy, statistically White, families, for making more money with one working spouse.[85] Brown's mother, who, she tells us, is generally apolitical, stated in shock: "They owe me and James reparations."[86] One of the truisms of public choice theory is that a large diffuse interest group will fail against a small, focused group with large buy-in and resources. But this is not the whole story, and it is not the only way collective action happens. To learn how the Code has discriminated against them and treated them differently from people who make the same or more money than they, is truly shocking. And, as Brown shows, these discrepancies are susceptible to explanation in clear, accessible prose. More broadly, Congress should make the racial disparities study part of the analysis of the effects of current and proposed taxes on specific types of tax payers,

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[84] DOROTHY BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021).

[85] *Id.* at 223.

[86] *Id.*

different types of families, different income levels, and a range of demographics. This information should be able to galvanize affected groups who could then contribute to large-scale lobbying efforts by the organizations mentioned.

There are in fact very powerful lobbying groups with large, diffuse constituencies. The American Association of Retired People, representing thirty-seven million members, is one of the country's most powerful lobbies; it is generally understood that Social Security and Medicare reform will not happen without its buy-in.[87] This could be a model for a way large, diffuse groups of taxpayers could wield influence in Washington. Once the government collects and disseminates this kind of information, organizations like the National Association for the Advancement of Colored People (NAACP) could run campaigns for tax reform to raise money for lobbying.

It may often be true that collective action is challenging for large, diffuse groups because of the problem of free riding.[88] But this is only a partial picture. For example, ideology may motivate people to vote even without a large economic stake in the outcome.[89] Indeed, American history is replete with examples of people voting against, or in spite of, their economic self-interest. Community activists ran campaigns about utility rates and phone charges even though each individual had small amounts of money at stake; people fought for toxic waste site cleanup despite the fact that getting local property on federal cleanup lists threatened their property values. In tax, Massachusetts voters recently passed the Fair Share Amendment, taxing with a 4% surcharge people with incomes over one million.[90] The amendment

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[87] Michael A. Fletcher & Zachary A. Goldfarb, *AARP Uses Its Power to Oppose Social Security, Medicare Benefit Cuts for Retirees*, WASH. POST (Nov. 18, 2012), https://www.washingtonpost.com/business/economy/aarp-uses-its-power-to-oppose-social-security-medicare-benefit-cuts-for-retirees/2012/11/17/affb5874-2aa6-11e2-bab2-eda299503684_story.html ("AARP's 37 million members and $1.3 billion budget are a force to be reckoned with").

[88] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); *see also* D. FARBER & P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 23–24 (1991) (discussing the Olson thesis).

[89] Daniel Farber & Phillip Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 702 (1991) (observing that "ideology mitigates the 'free rider' problem by motivating citizens to engage in political activity (including voting) that may not make much economic sense" (citation omitted)).

[90] Danny Jin, *Anticipating fierce opposition campaign, a local movement for 'millionaire's tax' ballot question emerges*, BERKSHIRE EAGLE, Feb. 27, 2022, https://www.berkshireeagle.com/news/local/

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passed despite threats that it would harm small businesses and that top earners would: "flee the state in droves."[91] And the Kansas legislature just avoided overriding the governor's veto of a flat tax which would have lowered many families' tax bills but cut into state funding for education and other public services.[92]

Finally, all of these articles make clear that there cannot be progress in the accountability of tax lawmaking without a concomitant discussion of race. As I have already noted, all three articles make clear that many features of the estate tax are the result of lopsided representation of the people affected: overrepresentation by the wealthy and lack of representation by those impacted, in particular racial minorities. But there is more to the story than political power, important as that is. What is the ideology that makes "taxing the rich" and having "death taxes" so unpopular? As Jonathan Metzl points out in his book *Dying of Whiteness: How the Politics of Racial Resentment Is Killing America's Heartland*, racial resentment has fueled resistance to taxes for the Affordable Care Act and school funding based on the message that "undeserving" minorities might benefit from these programs and from the taxes levied on the "rest" of us "hard working Americans."[93] As Metzl's book shows, the manipulation of racial division helps to quash any popular movement for tax fairness. But tax equity benefits the majority and will play an important role in addressing climate change, among other existential threats. This panel makes clear that it is time for some grassroots coalition building.

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local-movement-for-fair-share-amendment-grows/article_2371c8f4-9354-11ec-84f3-57ccaa115491.html (last visited June 2, 2023).

[91] *Id.*

[92] *Institute on Taxation & Economic Policy*, KANSAS AVOIDS FLAT TAX PROPOSAL: NARROW VICTORY A CAUTIONARY TALE FOR OTHER STATES (Apr. 27, 2023), https://itep.org/kansas-flat-tax-proposal-cautionary-tale-for-other-states/ (last visited June 2, 2023).

[93] JONATHAN METZL, DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND 225 (2020).

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