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NEW YORK UNIVERSITY
SCHOOL OF LAW

“Democratic Justice in Tax Policymaking.”
Clinton Wallace
University of South Carolina School of Law

September 1, 2020
Via Zoom
Time: 2:00 – 3:50 p.m. EST
Week 2

SCHEDULE FOR FALL 2020 NYU TAX POLICY COLLOQUIUM

(All sessions meet online on Tuesdays, from 2:00 to 3:50 pm EST)

1. Tuesday, August 25 – Steven Dean, NYU Law School. “A Constitutional Moment in Cross-Border Taxation.”
2. Tuesday, September 1 – Clinton Wallace, University of South Carolina School of Law. “Democratic Justice in Tax Policymaking.”
3. Tuesday, September 8 – Natasha Sarin, University of Pennsylvania Law School. “Understanding the Revenue Potential of Tax Compliance Investments.”
4. Tuesday, September 15 – Adam Kern, Princeton Politics Department and NYU Law School. “Illusions of Justice in International Taxation.”
5. Tuesday, September 22 – Henrik Kleven, Princeton Economics Department. “The EITC and the Extensive Margin: A Reappraisal.”
6. Tuesday, September 29 – Leandra Lederman, Indiana University Maurer School of Law. “Of Risks and Remedies: Best Practices in Tax Rulings Transparency.”
7. Tuesday, October 6 – Daniel Shaviro, NYU Law School. “What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?”
8. Tuesday, October 13 – Steve Rosenthal, Urban-Brookings Tax Policy Center. “Tax Implications of the Shifting Ownership of U.S. Stock.”
9. Tuesday, October 20 – Michelle Layser, University of Illinois College of Law. “How Place-Based Tax Incentives Can Reduce Economic Inequality.”
10. Tuesday, October 27 – Michelle Hanlon, MIT Sloan School of Management. [Paper on taxpayer responses to the 2017 tax act, using survey data.]
11. Tuesday, November 10 – Owen Zidar, Princeton Economics Department. “The Tax Elasticity of Capital Gains and Revenue-Maximizing Rates.”
12. Tuesday, November 17 – Abdoulaye Ndiaye, NYU Stern Business School. “Redistribution With Performance Pay.”
13. Tuesday, November 24 – Lilian Faulhaber, Georgetown Law School. “Searching for Coherence: The Overuse of Excess Returns and Excess Profits.”
14. Tuesday, December 1 – Erin Scharff, Arizona State Sandra Day O’Connor College of Law. “Revisiting Local Income Taxes.”

DEMOCRATIC JUSTICE IN TAX POLICY MAKING

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Clint Wallace *

The Tax Cuts and Jobs Act was the most significant tax law in more than three decades, but the strategy for getting it enacted included a variety of maneuvers to avoid public scrutiny. As a result, many taxpayers did not know how they would be affected until they filed their own tax returns more than a year later. This Article identifies this lack of transparency as part of a persistent pathology in tax policy making of avoiding and constraining democratic forces. To this end, various scholars and policy makers have sought to channel tax policy making away from democratic input and towards prescribed outcomes. This Article argues that these moves are grounded in strands of public choice theory that are expressly critical of democratic decision making.

This Article proposes four reforms to tax lawmaking in Congress to make resulting tax laws more democratically legitimate. One proposal, for example, is to require Congress to consider (and publicize) precisely how a proposed change in tax law is expected to affect different example taxpayers, including taxpayers from each Congressional District. This would allow actual taxpayers observing the policy making process to anticipate their treatment under a proposed law, and in turn demand greater responsiveness to their real interests from their representatives. Other proposals build on this approach, calling for drastically more transparency and a radical—but entirely achievable—reworking of the types of analysis produced and publicized in the federal tax legislative process.

These proposals are grounded in a two-part framework for democratically legitimate tax policy making, introduced in this Article and grounded in the theory of “democratic justice.” First, I argue that, contra the undemocratic moves uncovered here, a commitment to democratic legitimacy demands broad participation in tax policy making. This point connects tax policy with an important element of democratic theory, the principle of affected interests. Second, I argue that an inclusive tax policymaking process should have non-domination—i.e., preventing the use of power to threaten the basic interests of other people—as a central goal in decision-making procedures. As the proposals show, this framework suggests practical ways to reframe the standard normative debates in tax policy making.

TABLE OF CONTENTS

I. INTRODUCTION	3
II. THE UNDEMOCRATIC IMPULSE IN TAX POLICY MAKING	10
A. <i>Proposals and Practices</i>	10
1. <i>Dramatically Broad Delegations</i>	11
2. <i>Independent Policymaking Commissions</i>	15
3. <i>Framework Legislation and Chamber Rules</i>	18
B. <i>Public Choice Theory as Incomplete Justification</i>	23
III. A FRAMEWORK FOR DEMOCRATIC TAX POLICY MAKING	28
A. <i>Affected Interests</i>	30
B. <i>Non-Domination</i>	36
IV. DEMOCRATIZING TAX POLICYMAKING PROCESSES	39
A. <i>Transparency, Accountability, Responsiveness</i>	40
B. <i>Mechanisms for Democratizing Tax Policy Making</i>	44
1. <i>Analysis of Actual or Example Taxpayers</i>	44
2. <i>Sponsorship, Support and Reason-Giving</i>	46
3. <i>Engaging Unlikely Participants</i>	50
4. <i>Requiring Action on a Regular Basis</i>	52
C. <i>What to Expect from Democratic Tax Policy Making?</i>	54
V. CONCLUSION	57

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I. INTRODUCTION

When the Tax Cuts and Jobs Act was signed into law in December 2017, it was the most significant amendment to U.S. federal tax law in more than three decades.¹ The obvious question for taxpayers across the country was: how will it affect me? Surprisingly, the answer for most taxpayers, was: no one knows—to find out if they were better or worse off, individuals and businesses generally had to wait for more than a year until they actually prepared and filed their first returns under the new law.² This was months *after* election day for many of the members of Congress who advocated for and against the legislation. Transparency and accountability, both fundamental to democratic governance,³ were sorely lacking.⁴

Some of the process-based objections to the law carried the taint of partisanship—Democrats who opposed the bill complained, while Republicans celebrated.⁵ But eight years earlier the partisan sides were flipped as Republicans lodged process complaints about the enactment of

¹ Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054. The legislation is colloquially referred to as the Tax Cuts and Jobs Act, but as a result of a point of order raised in accordance with the Byrd Rule, described *infra* notes 98–106 and accompanying text, the official title is the “Act [t]o provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.” *Id.*

² See, e.g., Michael Rapoport, *Who’s the Center of Attention at Holiday Parties? Your Tax Accountant*, WALL ST. J. (Dec. 28, 2017), <https://www.wsj.com/articles/the-tax-law-makes-cpas-interesting-for-now-1514457000> (“CPAs acknowledge the complexity of the new overhaul is likely to ensure demand for their services remains high.”). Nearly two months after the law was enacted, the Tax Foundation released a “Tax Reform Calculator,” explaining that “many Americans are wondering what will actually happen to their tax liabilities when they file their taxes early next year,” and specifying that the tool they created still could not account for changes in the law applying to business income and self-employment income. Amir El-Sibaie & Tom VanAntwerp, *Introducing the Tax Foundation’s 2018 Tax Reform Calculator*, TAX FOUND. (Feb. 8, 2018), <https://taxfoundation.org/2018-tax-reform-calculator-explainer>. See also Jacob Leibenluft & Chye-Ching Huang, CENTER ON BUDGET AND POLICY PRIORITIES, *GOP Process Designed to Obscure Tax Plan’s Effects* (Nov. 28, 2017), <https://www.cbpp.org/research/federal-tax/gop-process-designed-to-obscure-tax-plans-effects> (noting as the plan neared enactment that “its implications are not fully understood.”).

³ See *infra* Part IV.A.

⁴ Cf. Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209, 218–20 (2020); Will Wilkinson, *The Tax Bill Shows the G.O.P.’s Contempt for Democracy*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/opinion/tax-bill-gop-democracy.html>; see *infra* notes 95–103 and accompanying text (discussing how framework legislation and budget estimates contributed to these democratic deficiencies).

⁵ See, e.g., C-SPAN, *Democratic Leaders News Conference on Tax Reform Bill* (Dec. 20, 2017), <https://www.c-span.org/video/?438838-1/democratic-leaders-schumer-pelosi-condemn-gop-tax-reform-bill> (quoting Senate Majority Leader Chuck Schumer saying that the process consisted of “one party negotiating behind closed doors, having one markup with only one expert witness while voting [down] every single amendment offered by Democrats.”).

another hugely significant piece of tax legislation, the Affordable Care Act.⁶ There were some similarities between the two—each was the product of significant out-of-public-view wrangling, each included special provisions that benefitted powerful special interests, and each was enacted using the same distinctive procedural mechanisms that help to avoid extended public debate.⁷ Hence, the processes in each case gave their critics fodder for complaints on democratic process grounds.⁸

American expectations of democratic control are arguably at their zenith when Congress exercises its constitutional power to tax (think: “no taxation without representation”).⁹ But, as experienced recently, modern tax policy making in the United States can feel divorced from the machinations of democracy.¹⁰ Indeed, among tax policy makers and scholars, democracy itself is commonly approached as an *obstacle* to implementing desired tax policies.¹¹ Experts, the thinking goes, can formulate tax policies that would benefit society by, for example, fostering economic growth, but the best conceived proposals cannot be enacted through America’s democratic procedures and institutions.¹² At the federal level, the perceived democratic barriers are erected in

⁶ See, e.g., Paul Ryan, *Government puts itself, not patients, in control of care*, MILWAUKEE JOURNAL SENTINEL (Jul. 18, 2009), <http://archive.jsonline.com/news/opinion/51054302.html> (“Congress is moving fast to rush through a health care overhaul that lacks a key ingredient: the full participation of you, the American people.”); see Alana Abramson, *Health Care Republicans Process Quotes*, TIME (May 4, 2017), <https://time.com/4766895/health-care-vote-republicans-process-quotes/> (listing process complaints lodged by congressional Republicans in 2009).

⁷ See *infra* Part II.A (discussing reconciliation legislation as a mechanism to constrain debate).

⁸ See *infra* notes 304–305 and accompanying text, further considering the democratic legitimacy of the Tax Cuts and Jobs Act and the Affordable Care Act.

⁹ U.S. CONST. art. I, sec. 8 (listing the first enumerated power: “The Congress shall have the Power to law and collect Taxes”); see, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (J. Marshall) (“The power to tax involves the power to destroy. . . .”); Taxpayer Bill of Rights 3, Pub. L. No. 105-206, 112 Stat. 726 (1998) (codified as amended in scattered sections of 26 U.S.C.) (the third “taxpayer bill of rights,” following laws enacted in 1988 and 1996, instituting various protections for taxpayers in administrative and enforcement proceedings, out of concern for abuses of the Federal taxing power). The most extreme version of arguments expressing concern over the government’s power to tax is Robert Nozick’s position that taxation is “on a par with” slavery. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); see Richard A. Epstein, *Taxation with Representation: Or, the Libertarian Dilemma*, 32 CAN. J. OF L. & JURIS. 7 (2005) (concluding that coercive taxation by a democratic state need not be rejected outright by libertarians).

¹⁰ There are many examples beyond of democratic process deficiencies for tax legislation beyond the Tax Cuts and Jobs Act and Affordable Care Act. Often over the last three decades, significant tax policies have been enacted based on budget gimmicks that put tax laws on the books for the future that policymakers know will never be seen to fruition; by lame-duck Congresses that will not have to answer to voters; or consisting of tax incentives that are put in place retroactively (eliminating possible incentive effects), among other examples of democratically deficient practices. Other examples are discussed *infra* notes 15-17 and accompanying text, and throughout.

¹¹ See *infra* Part II.

¹² E.g., Edward J. McCaffery & James R. Hines Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031, 1036 (2010) (citing “ordinary politics” as a cause of the failure of federal tax laws to achieve broadly desired levels of progressivity); Victor Fleischer, *Create a More Progressive Tax Policy*, AM. PROSPECT, Sept. 26, 2019, <https://prospect.org/day-one-agenda/create-a-more-progressive-tax-policy/> (proposing various ways that a president could “reshape tax policy without any help from Congress”); Jonathan Barry Forman & Roberta F. Mann,

the halls of Congress, with its byzantine committee process, burdensome procedural hurdles, constant myopic focus on elections and reelections of members, and attentiveness to interest group lobbyists.¹³

Some commentators have responded to the challenges that democratic decision making seems to present by advocating for mechanisms that would constrain or avoid democratic forces—what I refer to in this Article as the undemocratic impulse in tax policy making. These mechanisms work to enact desired tax policies by limiting who participates in tax policy making, or by favoring certain participants in the process or certain normative perspectives.¹⁴ Over the past few decades, tax policy making has come to feature regularly some of these arrangements. The Obama Administration considered commissioning a so-called “super committee” that would prescribe tax and spending policy with a mechanism to force Congress to accept whatever the committee proposed.¹⁵ Legislation has been proposed and enacted to use special procedures to limit policy options available to lawmakers and to channel lawmakers towards certain substantive policy outcomes.¹⁶ Tax scholars Jim Hines and Kyle Logue have gone as far as proposing to delegate tax rate setting authority to the Federal Reserve Board of Governors or a similar body focused exclusively on tax policy, so as to insulate tax policy making from political pressures.¹⁷ These approaches to tax policy making find support in public choice scholarship, which uses economic analysis to evaluate collective decision making,¹⁸ and which has become the preferred lens for analyzing the political economy of tax and other types of legislation.¹⁹

This Article responds to the undemocratic impulse in federal tax policy making, refocusing analysis on how to achieve democratic legitimacy rather than how to avoid democratic influences and institutions. For example, as proposed in Part IV, to counteract the uncertainty most taxpayers

Making the Internal Revenue Service Work, 17 FLA. TAX REV. 725, 789 (2015) (“We are at the point where it is difficult to enact even rational improvements to the tax system.”).

¹³ See *infra* Section II.B.

¹⁴ See *infra* Section II.A.

¹⁵ See *infra* Section II.A.2. The “super committee” specifically idea is discussed further *infra* notes 76–79 and accompanying text.

¹⁶ See *infra* Section II.A.3 (discussing framework legislation); see, e.g., Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.); Budget Control Act of 2011, Pub. L. 112-25, 125 Stat. 240. The focus on this paper is on tax policy making in the United States at the federal level, but similar sorts of constraints on tax policymaking options are imposed in states and local governments by way of state constitutions and other methods. See, e.g., Ariel Jurov Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884 (2020); Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 191–92 (2001).

¹⁷ James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235 (2015); see *infra* Section II.A.1 (critiquing Hines & Logue’s recommendations).

¹⁸ See generally 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 (No. 2, Autumn 1974).

¹⁹ See *infra* Section II.B (critiquing the public choice framework as applied to tax policymaking).

experienced with the Tax Cuts and Jobs Act and with other complex tax legislation, Congress should formally require, as part of the legislative process, detailed and accessible analysis of how specific provisions affect example taxpayers.²⁰ This reform would rely on Congress’s professional tax staff (housed in the Joint Committee on Taxation) to analyze the expected changes in tax liability for various example taxpayers in each congressional district—perhaps the median individual filing as a single taxpayer, the median family of four, a small service-providing business, and so on. Thus, before a congressperson voted on final legislation, he or she would receive a district-specific report (which would also be made public) showing the effects on variations of common taxpayers who are his or her constituents, based on demographics of the district and models of taxpayer responses.²¹

These proposals are based on a theoretical framework for democratic tax policy making, introduced in Part III, that responds to and pushes back against the public choice literature recommendations. The framework and reform proposals presented here build on the idea that perceptions of fairness and justice in taxation are closely connected to the procedures for setting the rules, not simply the resulting distributions of resources.²² The process-oriented framework introduced here is grounded in Ian Shapiro’s concept of “democratic justice,”²³ which approaches political institutions as centrally focused on managing and mediating power dynamics within the democratic community and in decision making processes.²⁴ These concepts are compatible with an array of theories of democracy, from minimalist to robust deliberative models,²⁵ but the starting point for the application of the framework is the current U.S. federal tax policymaking institutions

²⁰ See *infra* Section IV.A.

²¹ As discussed *infra* Section IV.A.1, this analysis should be feasible based on currently available data and models.

²² See STEVEN M. SHEFFRIN, *TAX FAIRNESS AND FOLK JUSTICE* 18 (2013) (describing “folk justice,” in contrast to “expert justice,” as more heavily incorporating concerns about “process and procedure” rather than focusing solely on distribution).

²³ IAN SHAPIRO, *DEMOCRATIC JUSTICE* (1999).

²⁴ See IAN SHAPIRO, *POLITICS AGAINST DOMINATION* 33 (2016).

²⁵ See *generally* JOHN STUART MILL, *ON LIBERTY* (J.W. Parker & Son, 1859) (describing general precepts of liberal democracy as, among other things, facilitating political discourse); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269–83 (HARPER Perennial Modern Thought ed. 2008) (1942) (adopting a *minimalist* model of democracy, which demands competitive elections and not more than that); ROBERT A. DAHL, *ON DEMOCRACY* (2d ed. 2015) (adopting a *pluralist* model, in which interest groups compete and collaborate to promote specific interests); BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (2003) (describing a *participatory* model featuring mechanisms to foster inclusion in democratic decision-making processes, on the idea that participation fosters legitimacy and yields benefits to the engaged population); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1 (1996) (advocating a *deliberative* model that goes even further than participatory models to focus on creating conditions for members of the democratic community to “reason together to reach mutually acceptable decisions.”); PETTIT, *supra* note 33 (describing the *constitutional* model, which combines republican representative governance with the possibility of constraints on the potential outcomes of democratic decision making). CUNNINGHAM, *supra* note 139, at 13, 25, 27, 29, 123–33 (synthesizing and critiquing the various alternatives).

and practices, and the proposals that follow from it are intended to be compatible with the United States’ representative system and with committee specialization in Congress.²⁶

The theoretical framework for democratic tax policy making consists of two parts. First, I argue that the *principle of affected interests* demands broad inclusion in tax policy making when applied to the breadth of the federal tax system.²⁷ The basic idea is that every member of a democratic community who is affected by a particular decision should be included in the decision-making process.²⁸ This concept is so fundamental to any conception of democracy, that it often plays into normative democratic theory debates without mention—for example, the debate about decision rules (majority versus universal consent) implies full inclusion of affected interests.²⁹ But, in real world tax policy making, who constitutes an affected interest is often obscured by technical complexity and by an opaque policymaking process. I argue that tax policy decisions affect a variety of margins for many members of the democratic community of the United States, whether or not they are directly implicated by the specific question at hand.³⁰ Under the principle of affected interests, this breadth militates towards broadly inclusive participation in federal tax policy making.³¹

The second element of this framework is that democratic tax policy making should be characterized by *non-domination*.³² Concern about domination, which is defined generally as the use of power to threaten the basic interests of others, is central to democratic justice. This sort of domination is anti-democratic in that democracy demands equal footing in decision making.³³

²⁶ See Clarissa Rile Hayward, *Making interest: on representation and democratic legitimacy* in POLITICAL REPRESENTATION 111-12 (Ian Shapiro, ed., 2009). Hayward describes the “conventional view” of representation bolstering democratic accountability, with appropriate safeguards. *Id.* She goes on to contest this view; in contrast, this Article accepts the existing constitutional structure and proposes changes within that structure. See *infra* notes 213–214 and accompanying text, discussing “adaptive political theory” and institutional re-design (as contrasted with designing institutions from scratch).

²⁷ See *infra* Section III.A.

²⁸ See, e.g., Archon Fung, *The Principle of Affected Interests: An Interpretation and Defense*, in REPRESENTATION: ELECTIONS AND BEYOND 236 (Jack H. Nagel & Rogers M. Smith eds., 2013).

²⁹ See *infra* note 137 and accompanying text; see also *infra* note 186 (discussing a more expansive approach).

³⁰ This argument is not that tax policy is unique among areas of federal policy making in affecting many or all community members; my focus here is limited to tax policy, though the implications of this argument extend to other areas as well.

³¹ See *infra* Part IV (discussing mechanisms to facilitate inclusivity in U.S. federal tax policy making).

³² See *infra* Section III.B.

³³ See SHAPIRO, *supra* note 23. This concept developed by Shapiro and in this Article is similar to, but distinct in important ways, from domination concepts offered by other democratic theorists and political philosophers. See, e.g., PHILLIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51– 52 (1997) (describing “freedom as non-domination,” and advancing a concept of domination that exists when one agent has “power of interference on an arbitrary basis” over another); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY

Thus, the process should be designed to mitigate the extent to which power accrued outside of the process shapes what happens inside the process.³⁴ For example, a typical way for powerful interest groups to garner benefits from tax lawmaking currently is to request that a friendly or financially dependent representative add specific language to a piece of legislation, preferably at a juncture (late in the process) and in a manner (hidden in complexity) that will attract little outside scrutiny.³⁵ This sort of action may constitute domination, and it produces democratically suspect outcomes that are problematic for how the democratic community feels about the tax system, regardless of the substantive results.³⁶ Conversely, a process that features non-domination can legitimate the substantive decisions reached. Relatedly, I argue that tax policy making should be an iterative process so as to ensure that decisions, once made, can subsequently be challenged and reconsidered in a decision making setting that continues to protect against domination.³⁷ An iterative process recognizes the contingency of democratic decisions, and appreciates that “in democratic politics, all destinations are temporary.”³⁸

The framework and the specific proposals that follow from the framework are intended to fill a void in existing scholarship: on the one hand, political theorists and democracy scholars pay significant attention to the conditions that shape a democratic community and can help it to flourish, but do so with little regard for taxation.³⁹ On the other hand, tax scholars focus on the normative criteria of equity and efficiency as the bases for establishing a desirable tax system, but often with little regard for governing context in which tax policies are established and operate, nor for democratic values generally.⁴⁰ Debating these subjects in isolation, or resorting to the public

(1983) (introducing a contextual theory of justice focused on limiting domination across different social spheres), and others. *See* Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L. J. 293 (2012) (comparing alternative conceptions of non-domination proposed by various democratic theorists).

³⁴ *Cf.* WALZER, *supra* note 33, at 19 (describing “complex equality” as entailing that “no citizen’s standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other social good.”).

³⁵ *See, e.g.*, Clinton G. Wallace, *The Troubling Case of the Unlimited Pass-Through Deduction*, 88 U. CHI. L. REV. ONLINE (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583074 (describing how the chair of the Senate Finance Committee responded to real estate lobbying interests to insert a \$135 billion retroactive tax cut into coronavirus response legislation).

³⁶ *See infra* Part III.B; SHEFFRIN, *supra* note 22.

³⁷ SHAPIRO, *supra* note 23, at 39; *see also* SHAPIRO *supra* note 24, at 17.

³⁸ WALZER, *supra* note 33, at 310.

³⁹ Sven Steinmo confronts exactly this gap from a political science perspective in his comparative study of taxation in four modern democracies, observing that how governments raise revenue “and whom they take it from are two of the most difficult political issues faced in any modern political economy. . . . Yet students of politics have largely ignored tax policy over the decades.” SVEN STEINMO, *TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE I* (1993). *But see* IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 104–45 (2003) (in a chapter titled “Democracy and Distribution,” Shapiro discusses possible reasons why democracies have not yielded greater downward redistribution, and contemplates ways that democratic institutions might enact policies, including specifically tax policies, that carry out greater redistribution).

⁴⁰ *See, e.g.*, ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, Book V, Chapter II (R.H. Campbell et al. eds., Liberty Classics 1981) (1776) (discussing four principles of taxation: fairness,

choice framework to justify attempts to confine democratic decision making, sidesteps the important reality that often “tax policy choices are most directly the result of differences in the structure and design of... political decision-making institutions.”⁴¹ That reality is imprinted in the federal tax system with the enactment of the Tax Cuts and Jobs Act and other recent tax legislation considered in this Article.⁴²

The paper proceeds as follows: Part II uncovers and examines the undemocratic impulse in tax policy making and tax scholarship, which I argue is rooted in public choice scholarship. Part III introduces a two-part theoretical framework for democratizing tax policy making, first exploring the principle of affected interests in the U.S. federal tax policymaking arena and second introducing the concept of non-domination as relevant to tax policy making. In Part IV, I propose four specific reforms that can bolster democratic legitimacy in federal tax policy making in accordance with the framework. Part IV also begins to consider what the vision of democratic tax policy making presented here might mean in terms of substantive tax policy. Part V concludes.

certainty, convenience and efficiency); *see generally* Allison Christians, *Introduction to Tax Policy Theory* (May 29, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186 (describing the normative foundations of tax policy as equity, efficiency, and administrative capacity, and dividing equity into benefits theory and ability to pay). To be sure, numerous scholars have examined the democratic implications of substantive tax policy; this Article expands on and responds to this growing literature. *E.g.*, Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617 (2016); Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1, 2 (1996); James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825, 840–49 (2001) (summarizing research on concentrations of wealth and democratic effectiveness); James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1132 (2008); Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415 (2003); Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 923 (1997); Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1441 (2018) (introducing a theory of relative economic power, discussed *infra* notes 295–296); Philip Hackney, *Political Justice and Tax Policy: The Social Welfare Organization Case 17* (Feb. 3, 2020) (unpublished manuscript) (on file with author) (proposing “political justice” as an evaluative framework for substantive tax policy); James R. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Income Tax*, 24 FLA. TAX REV. __ (forthcoming 2020) (Draft of Dec. 4, 2019) (exploring the effects of inequality on normative tax analysis); Clinton G. Wallace, *Tax Policy and Our Democracy*, 81 MICH. L. REV. 1233 (2020); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751; Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555 (2002); Saul Levmore, *Taxes As Ballots*, 65 U. CHI. L. REV. 387, 387 (1998); CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009); MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS (2008); VANESSA S. WILLIAMSON, READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES (2017); LAWRENCE ZELENAK, LEARNING TO LOVE THE 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 17 (2013).

⁴¹ STEINMO, *supra* note 39, at 195. *See also* Edward McCaffery, *Tax’s Empire*, 85 GEO. L.J. 71, 93 (1996) (making a similar point regarding the disconnect, which is discussed further below, *infra* note 156).

⁴² *See infra* notes 304–305 applying the framework presented in this Article to the Tax Cuts and Jobs Act and the Affordable Care Act.

II. THE UNDEMOCRATIC IMPULSE IN TAX POLICY MAKING

When tax scholars and policymakers venture into suggestions about how to structure tax policy making procedures, their prescriptions often seek to insulate decision makers from democratic forces.⁴³ As reviewed in Section A, this undemocratic impulse is found in proposals for drastically broad delegations, independent commissions, and framework legislation. These mechanisms are generally presented as *realpolitik* responses to Congressional gridlock or to interest-group-enforced Congressional intransigence, as ways to constrain the supposedly harmful strains of political activity. These justifications are based on tax policy outcomes, not on considerations pertaining to democratic decision making.

Section B ascribes these proposals to public choice scholarship. This is my attempt to find the strongest normative justifications to respond to my own charge that the proposals are undemocratic. I make the case that the public choice framework and related arguments⁴⁴ cannot bridge the divide between tax scholarship and democratic theory—the public choice framework seems to be intrinsically undemocratic,⁴⁵ and its policy prescriptions often come at the expense of important issues in democratic decision making.

The broader critique developed throughout this Part II is that in addressing tax policy making procedures, tax scholars are only asking *some* questions relevant to tax policy making. They *should* be asking questions reflecting the standard normative commitments in taxation (*i.e.*, what specific legal rules can lead to fair distributions and promote efficiency and so on), *and* questioning what the decision making context (*i.e.*, democratic institutional commitments) suggest about how those rules should be arrived at.⁴⁶ The proposals described here, and the public choice framework that tax scholars reflexively turn to when analyzing the political economy of tax policy making, are insufficient from the perspective of democratic decision making. Nonetheless, the undemocratic proposals surveyed in this Part have framed tax policymaking reforms over the last several decades. The theoretical framework introduced in Part III and the proposals offered in Part IV represent a more democratically conscious alternative.

A. *Proposals and Practices*

Undemocratic proposals for tax policy making come in a variety of forms: (1) dramatically broad delegations, (2) independent commissions, and (3) framework legislation and budget rules designed to shape the policymaking process. I argue that each of these mechanisms works

⁴³ See *infra* Section II.A below.

⁴⁴ Notably, the literature on entrenchment, which is related to but distinct from public choice, offers some constitutional justifications for some of the proposals I have described as undemocratic. See *infra* notes 152–154 and accompanying text.

⁴⁵ In particular, see *infra* notes 127–138 and accompanying text.

⁴⁶ My focus in this Article is on the procedural element: how should tax rules be determined. I reserve for later the question of what democratic values suggest about substantive tax policy, which follows from this line of thought. See generally Wallace, *supra* note 40 (introducing some potential ways in which democratic values could shape substantive tax policy).

undemocratically in two particular ways. First, each moves the tax policymaking process to forums that limit public input and limit responsiveness and accountability to certain constituencies. Second, these mechanisms often favor predetermined outcomes and specific normative perspectives. The details and potential consequences of each type of proposal are described in turn below.

1. *Dramatically Broad Delegations*

Congressional delegations to administrative agencies are commonplace in the modern Federal government. Broad delegations that give agencies wide-ranging policy discretion raise some basic and well-recognized democratic concerns, which scholars have confronted extensively.⁴⁷ Although there are instances in which Congress has delegated broadly in the tax code,⁴⁸ tax legislation has generally consisted of Congress enacting extremely detailed tax statutes that leave little room for discretion to be exercised by Treasury or any other agency.⁴⁹ Congress has been able to legislate with specificity and in high volumes without relying on delegation because of the institutional capacity it has developed in-house.⁵⁰

⁴⁷ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (defending political accountability for agency action by way of the President); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42 (2010) (expressing concerns about mechanisms to protect against capture and to protect “politically disadvantaged groups”; this is one example of the extensive literature debating the benefits and costs of delegation and reliance on experts).

⁴⁸ For example, section 482. See Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 206–07 (2017).

⁴⁹ See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 196–206 (1999) (quantifying Congressional delegations in tax legislation as especially limited compared to other areas of law); Wallace, *supra* note 48, at 211–12 (reviewing literature showing that tax statutes are among the most detailed that Congress enacts, and that broad grants of discretion are exceedingly rare, and presenting normative arguments in favor of that approach).

⁵⁰ Congress is consistently very active in enacting new tax laws and amending and tweaking existing laws. See David A. Weisbach, *Distributionally Weighted Cost-Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. LEGAL ANALYSIS 151, 174 (2015) (summarizing research on changes to the tax code, showing in various ways a huge volume of legislative enactments, including more than 500 in 2008, and perhaps 15,000 changes from 1986 to 2012). It does this by way of the JCT, a bicameral, non-partisan expert staff that advises Congress on tax law and policy specifically. See Wallace, *supra* note 48, at 206. The JCT’s existence and effectiveness goes a long way to explain *how* Congress has avoided relying on broad delegations in tax law. See George K. Yin, *James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 788 (2013).

One manifestation of the undemocratic impulse is dramatically broad delegations.⁵¹ In their article *Delegating Tax*, James Hines and Kyle Logue make an extended case for these sorts of delegations, arguing that tax policy making should be entrusted to professional staff who have “political independence.”⁵² Hines’ and Logue’s most drastic proposal is for Congress to delegate authority to set tax rates to the Federal Reserve Board of Governors or to a similar sort of “independent” regulatory body.⁵³ Their goal is to allow the Federal Reserve to coordinate fiscal policy (typically the purview of Congress) with monetary policy (long reserved for the independent Federal Reserve Board).⁵⁴

While there is an extensive literature on the importance of central bank independence and expertise,⁵⁵ there is no similar body of literature or academic support for the necessity of political independence in tax policy.⁵⁶ The authors dismiss concerns related to democratic values as having been “overstated” by critics.⁵⁷ But the authors note that the distributional effects of tax policy are “quintessentially political decision[s] entailing tradeoffs among different groups of taxpayers.”⁵⁸

In contrast, the Federal Reserve is the most extreme existing version of an independent government agency: its features make it the most politically insulated piece of the Executive

⁵¹ *E.g.*, Hines & Logue, *supra* note 17; Joseph Henchman, TAX FOUNDATION SPECIAL REPORT, VIRGINIA SUPREME COURT CONSIDERS TAXPAYER PROTECTIONS IN NVTA TAX CASE (Feb. 2008) (critiquing a state government delegation of special taxing authority to an unelected “transportation authority,” in a structure that was subsequently struck down under the state constitution).

⁵² *Id.* at 247; *see also id.* at 262 (discussing the benefits of reducing “political influence” as a way to signal commitment to certain policies); *id.* at 264 (discussing political insulation); *id.* at 267 (discussing the possibility of increased politicization of a body to which Congress delegates authority); *id.* at 269 (discussing political insulation through the lens of nondelegation doctrine).

⁵³ *Id.* at 239. They also propose, less radically, that Congress should enact some tax measures in the form of a “general statement of policy goals to pursue,” delegating to experts in the Department of Treasury to sort out the policy particulars. *Id.* This proposal is focused on “tax subsidy programs,” with the authors using the example of the research and development tax credit under § 41.

⁵⁴ Hines & Logue, *supra* note 17, at 239.

⁵⁵ *See, e.g.*, ALAN S. BLINDER, *THE QUIET REVOLUTION: CENTRAL BANKING GOES MODERN* (2004) (explaining tension between the allure of short-term growth, often appealing to politicians thinking about reelection, that can be accompanied by potential long-term harm of inflation). There are also various law review articles on the subject. *E.g.*, Neil H. Buchanan & Michael C. Dorf, *Don’t End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1 (2016); Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 J. LEGAL STUD. 433 (1998).

⁵⁶ Hines and Logue acknowledge that some elements of their proposals would be “unprecedented.” Hines & Logue, *supra* note 17, at 239.

⁵⁷ *Id.* at 246.

⁵⁸ Hines & Logue, *supra* note 17, at 257–58. Part of the authors’ response to this critique is that delegation of rate setting need not also entail delegation of distributional decisions: Hines and Logue contemplate that Congress could limit the Federal Reserve’s discretion by specifying the final distribution of the federal tax burden. *Id.* at 239. The apparently political nature of the authority they proposed to delegate led commentators responding to the Hines/Logue proposal repeatedly to reach the conclusion that tax policy decision making “must rest with Congress alone.” *Id.* at 258 n.108. To this point, the authors respond that they could find *no* longform written version of the argument that Congress should set tax rates; it seems that the general notion of congressional supremacy in distributional tax issues has gone unchallenged until their proposal.

Branch, and indeed have raised persistent questions about the constitutionality of its structure and the potential lack of democratic accountability for the decisions the Federal Reserve Board makes.⁵⁹ Its members are protected from removal by the President by statute so that they do not feel obliged to follow administration policy; it has independent litigation authority, so does not need to rely on the Department of Justice to support its legal positions;⁶⁰ it has its own source of funds so that it does not rely on Congress for annual appropriations;⁶¹ its regulatory actions are exempt from centralized review by the Office of Information and Regulatory Affairs and its interactions with Congress are exempt from the sort of White House review to which departments and agencies are generally subject;⁶² and its multimember structure is thought to facilitate independent “deliberative decision making” and foster greater reliance on expertise.⁶³

Hines and Logue describe their proposal to give the Federal Reserve tax rate-setting authority as empowering it to fight economic contractions by “precommit[ting] to an optimal policy plan over time, which Congress notoriously struggles to do.”⁶⁴ Implicit in this description of Congress’s deficiencies is a critique of the influences to which Congress is responsive. By transferring authority, some of those influences could be screened out. But this sort of highly-insulated body would, by design, severely limit opportunities for public participation in tax policy making. Even the concept of insulation is potentially suspect here: this approach would also almost certainly favor certain insiders, such as sophisticated taxpayers who are able to hire representatives to navigate and engage with less public decision-making processes.⁶⁵

Further, explicit in the proposal is a normative decision to prioritize promoting economic growth (and preparing to be able to promote growth in certain limited circumstances) over other potential allocative or distributional decisions that might come to bear if Congress maintained plenary authority over tax rates and considered rate changes in conjunction with other tax policy

⁵⁹ See BLINDER, *supra* note 55, at 9; Buchanan & Dorf, *supra* note 55; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013). Note, however, that beyond legal literature some aspects of Federal Reserve practices are viewed as promoting at least limited degrees of political accountability. *E.g.*, Ellen E. Meade & David Stasavage, *Publicity of Debate and the Incentive to Dissent: Evidence from the US Federal Reserve*, 118 ECON. J. 695 (2008) (empirical study of the effects of new transparency requirements on Federal Reserve Federal Open Market Committee deliberations).

⁶⁰ 12 U.S.C. § 248(p), *cited in* Datla & Revesz, *supra* note 59, at 800 n.167 (2013).

⁶¹ 12 U.S.C. § 243, *cited in* Datla & Revesz, *supra* note 59, at 841.

⁶² 12 U.S.C. §§ 247, 250, *cited in* Datla & Revesz, *supra* note 59, at 804 n.195.

⁶³ Datla & Revesz, *supra* note 59, at 794.

⁶⁴ Hines & Logue, *supra* note 17, at 239. *See also id.* at 252, 261 (using the term “optimal” repeatedly to describe the possibilities that could be achieved under their proposals; although they do not define what the optimal policy is, they reference it contextual but generally beyond the capacities of Congress to enact).

⁶⁵ *See* Wallace, *supra* note 48, at 217 (showing that there is very limited public engagement in tax rulemaking and that the vast majority of participants in most notice and comment processes for tax regulations as sophisticated private interests).

changes. In short, the authors anticipate better outcomes in one specific respect, accomplished by transferring decision making from (potentially) politically accountable representatives to (deliberately) politically insulated and properly directed experts.

Hines and Logue believe that the case for policy making via delegation to an insulated body of this sort “is as strong with tax as elsewhere.”⁶⁶ The tax system, they argue, is missing out on specific benefits facilitated by delegation to agencies in the modern administrative state, namely reliance on expertise in policymaking settings that are shielded from political winds.⁶⁷ They argue that the benefits of expertise accrue in other areas of law in which Congress makes broad delegations to administrative agencies—transportation, food and drug, environmental, and health care, to name a few—should also be bestowed on tax policymaking.⁶⁸ They also argue that broad delegations to experts allow for policy changes that are more responsive to “changed circumstances,” because the legislative process is so cumbersome.⁶⁹ Finally, they argue that delegation is justified by the substantial administrative law literature justifying administrative governance as legitimized by the oversight of a politically accountable President.⁷⁰

These are conventional justifications for broad congressional delegations, and for the administrative state more generally, which the authors acknowledge. But those arguments do not account for the extreme insulation of the Federal Reserve Board—which is both controversial, and normatively justified in the context of monetary policy. As discussed in Part III, cutting taxes for some people now may necessarily require increasing taxes for someone else, either now or later.⁷¹ In that paradigm, a directive to adjust tax rates for the purpose of controlling the business cycle will result in tax rate changes with benefits accrued now and costs deferred or shifted, and no apparent plan to assess those tradeoffs or who the winners and losers might be.

The authors acknowledge that “delegation arguably reduces the democratic nature of the system, undermining the legitimacy” of whatever policies are ultimately adopted—which they explain to mean that policies that are the product of this sort of broad delegation may lack public

⁶⁶ *Id.* at 243. Although the authors acknowledge some pre-enactment policy making and analytical capacities within Congress, they do not discuss that the JCT gives Congress special institutional capacity to produce tax legislation. *See supra* note 51.

⁶⁷ *See, e.g., id.* at 239 (discussing the “relative-expertise” justification for broad delegations). This argument seems to disregard the fact that Congress very regularly enacts tax legislation. *See Weisbach, supra* note 50. Also, curiously, the Federal Reserve Board is composed of business and finance leaders, and staffed by economists and other specialists but not tax experts; presumably in the Hines and Logue plan, they would hire tax economists and tax attorneys to facilitate tax policy making, but currently there is no particular tax expertise within the Federal Reserve organization.

⁶⁸ *Id.* at 239, 257–58. They also argue that in other contexts, Congress delegates important policy matters, including decisions with distributional consequences, to agencies, for example environmental regulation under the Clean Air Act. *But see* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018) (arguing that distributional consequences should be more of a focus in regulatory decision making).

⁶⁹ *Id.* at 243.

⁷⁰ *Id.* at 240 n.56 (citing Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1995)). They also make the case that there are ample opportunities for public input into policy decisions made at the administrative agency level. Hines & Logue, *supra* note 17, at 240. And they argue that if Congress does not like what an agency does, Congress can pass another law. *Id.* at 246–47.

⁷¹ *See infra* Part III.A (discussing whose interests are potentially affected by tax policy changes).

accountability, and thus may be judged to be illegitimate.⁷² They also acknowledge that there are mechanisms included in the constitutional and institutional design of Congress that allow “voters to understand their representatives’ contributions to legislation outcomes, and to a certain degree, why legislators voted the way they did,” facilitating accountability.⁷³ But their proposal attributes little importance to the accountability gap they recognize exists.

Thus, in what is a common theme across proponents of these undemocratic policymaking proposals, the authors make a positive case for the potential benefits of greater expertise and insulation from politics, but their consideration of the potential normative costs of their proposals is limited. The fact of costs are apparent in the ways that democratic engagement is limited, but the extent of costs is more challenging: as discussed in Part III, these costs are imposed on taxpayers who perceive that they have not been treated fairly (or not been included at all) in the tax policy making process, and when certain taxpayers interests are losers in that closed process.

2. *Independent Policymaking Commissions*

Another perennial proposal reflecting the undemocratic impulse is that Congress should turn over policymaking authority for a full overhaul of the federal tax code to an independent commission.⁷⁴ Hines and Logue present an argument in favor of this sort of proposal as well—in their version, the commission would be charged with producing a comprehensive plan that would go into effect unless Congress voted to block it.⁷⁵ They compare their proposal to the Base Realignment and Closure Commissions that Congress established at several junctures to reduce the number of military bases in the 1990s and 2000s,⁷⁶ as well as to the various “super committee”

⁷² *Id.* at 245–46. The authors also acknowledge potential tax-specific Constitutional limitations on delegation. *Id.* at 268–72.

⁷³ *Id.* at 245. That, is, they acknowledge that Congress has some potential advantages in providing transparency and accountability as compared to the delegations that Hines and Logue propose.

⁷⁴ As discussed below, versions of this were attempted by Congress in 1992, 2011 and 2018, though none ever successfully resulted in any legislative enactment.

⁷⁵ Hines & Logue, *supra* note 17, at 264–68. They state that their focus is on post-enactment policymaking authority, i.e., authority that Congress delegates as part of an enacted law. *Id.* at 238. The commission model described in this section is better characterized as a pre-enactment constraint or as operating coincident with enactment, but purposefully limiting the extent to which Congress and democratic forces can influence the specifics of legislation. The distinction could be meaningful from a democratic perspective, depending on the democratic bona fides of the enactment process, *see infra* Part III, but as described throughout this section Hines and Logue are primarily focused on considerations other than democratic values.

⁷⁶ *Id.* at 239; *id.* at 243–44.

proposals advanced from time to time in Congress.⁷⁷ The basic idea is that a committee appointed by Congress would put together a proposal that Congress would then be required to vote on without amendment and without delay. This would allow a panel of experts—again, insulated from political influences—to deliver the tough medicine policies that the country needs, in a way that “politics or logrolling among members of Congress” could never be expected to achieve.⁷⁸ The idea has been proposed by various politicians and policymakers over the years, and a weak version of a super committee was attempted unsuccessfully in 2011.⁷⁹

Hines and Logue describe a series of formal approvals required under the base realignment and closure law—approval by military leaders, the president, the commission, and a final opportunity for Congress or the President to reject the closures—which allow for some democratic oversight, but transfer specific policy decisions to the commission.⁸⁰ Applying this concept to tax reform, Hines and Logue imagine a process whereby Congress would authorize “a group of experts” to put together a comprehensive plan that would go into effect with the approval of the President, unless Congress specifically voted to prevent its implementation.⁸¹ The advantages they tout for this sort of approach include ability to overcome any “politically powerful constituency” that might block reform of specific provisions.⁸² They also float the possibility that the policies set by a commission could be in some way binding on future Congresses, so that the country would be stuck with the expert-generated policies even in the face of future political opposition.⁸³

These proposals are in various ways expressly undemocratic.⁸⁴ By shifting control from members of Congress to an unelected commission, the proposal would limit responsiveness and accountability—especially if the commission is set up so that subsequent Congressional inaction results in enacting the proposal adopted by the commission. It would also seem to limit public participation in the process if the commission did not engage in outreach (although as discussed below this could be avoided). Establishing a more closed process would tend to favor more sophisticated constituencies who have insider access.⁸⁵ Additionally, there is a common theme in these proposals of using the commission to accomplish a specific set of policy outcomes that

⁷⁷ *Id.* at 266; see Mark Strand & Tim Lang, *Bipartisan Budget Reform Committee: Congress’ Best Hope to Fix Budget Process. Update: Committee Members Named*, CONG. INST. (Feb. 2, 2018), <https://www.congressionalinstitute.org/2018/02/22/bipartisan-budget-reform-committee-congress-best-hope-to-fix-budget-process/>; Howard Gleckman, *Deficit Super Committee Still Not Serious*, TAX POL’Y CTR. (Nov. 10, 2011), <https://www.taxpolicycenter.org/taxvox/deficit-super-committee-still-not-serious>; Don Wolfensberger, *Super Committee is Not So Super*, THE HILL BLOG (Feb. 16, 2019, 4:45 PM), <https://thehill.com/blogs/congress-blog/economy-budget/374293-super-budget-committee-is-not-so-super>.

⁷⁸ Hines & Logue, *supra* note 17, at 264.

⁷⁹ See *supra* note 77.

⁸⁰ Hines & Logue, *supra* note 17, at 243–44.

⁸¹ *Id.* at 265.

⁸² *Id.*

⁸³ *Id.* at 267–68. See *infra* notes 93, 152 and accompanying text, discussing entrenchment.

⁸⁴ This analysis is discussed further *infra* Section II.B.

⁸⁵ As Hines and Logue note, “There is no doubt that the locus of lobbying efforts...would turn more toward...whatever entity Congress empowers with greater tax lawmaking authority.” Hines & Logue, *supra* note 17, at 267.

Congress will not be able to enact on its own. Hines and Logue are particularly interested in the prospect of addressing “long-run fiscal imbalance,”⁸⁶ which implies increasing tax revenue and/or reducing spending over time. That long term goal is certainly primed for democratic debate, and the particulars of either raising revenue or reducing spending are precisely the issues that are perennially the subjects of political campaigns. Thus, by shifting that authority from members of Congress subject to regular elections, to decision makers insulated from those forces, the result is necessarily a different sort of analysis of whose taxes should be increased, and what spending should be cut.

Compared to the Federal Reserve proposal, the independent commission proposal is more malleable in ways that affect the extent to which it might be undemocratic in practice. In particular, the Base Realignment and Closure Commission (BRAC) experiences show that an independent tax commission could offer some democratic process benefits in respects that Hines and Logue did not address. The design of the BRAC required that it be carried out in various ways intended to foster public input, transparency, and reason-giving.⁸⁷ The Commissioners had a diverse variety of professional and personal backgrounds, reflecting various constituencies that would potentially be interested in the decisions with which the BRAC was tasked.⁸⁸ These commissioners were tasked with evaluating a list of recommended closings provided by the presidential administration, and to undertake this evaluation by independently collecting information and holding public hearings in the proposed closure sites and elsewhere.⁸⁹ And the Commission was required to produce a public report justifying, in detail, the considerations that went into each of their recommendations.⁹⁰ The final report and appendices from the 2005 round of base closures runs 758 pages, and provides extensive justifications for each military facility that the Commission determined should be closed, as well as explanations for those it determined should be kept running.⁹¹ Thus, Congress structured the delegation not only to take advantage of expertise, but also to have *someone* carry out a public process that would establish legitimacy and help to justify to the public the final decisions.

⁸⁶ *Id.*

⁸⁷ See DANIEL H. ELSE & DAVID E. LOCKWOOD, CONG. RESEARCH SERV., RS22061, MILITARY BASE CLOSURES: THE 2005 BRAC COMMISSION (Mar. 11, 2005), <https://fas.org/sgp/crs/natsec/RS22061.pdf>.

⁸⁸ The Commission consisted of nine individuals appointed by the President, of whom six were designated by bipartisan members of Congress. The 2005 commission included civilians, former political officials, former military leaders, and professional policy experts. *Id.*

⁸⁹ *Id.*

⁹⁰ ANTHONY J. PRINCIPI ET AL., 2005 BASE REALIGNMENT AND CLOSURE COMMISSION REPORT (2005), <https://www.epa.gov/sites/production/files/documents/bracreportcomplete.pdf>.

⁹¹ *Id.*

But Hines and Logue did not discuss these aspects of the BRAC design and experience. Rather, the benefits they tout are, as with the extreme version of broad delegations discussed in the prior section, focused on expertise and avoiding political influences, and overcoming the challenges of strong constituencies for narrowly focused benefits.

3. Framework Legislation and Chamber Rules

Framework legislation and chamber-specific operating and procedural rules can shape and constrain the policy choices available to Congress, facilitating the enactment of tax legislation, but, as explained below, this can come at the expense of democratic deliberation. Elizabeth Garrett defined framework legislation as “laws [that] establish internal procedures that will shape legislative deliberation and voting with respect to certain laws or decisions in the future.”⁹² In effect, framework legislation imposes requirements via statute for how Congress must proceed in considering and enacting certain legislation. Rules can operate in the same manner as framework legislation, but rules as used here refers specifically to the procedures and requirements that each house of Congress adopts to control its own operations.⁹³ Tax policy making has in recent decades been shaped by each of these mechanisms and each is discussed below.⁹⁴

Framework legislation. The primary framework that has shaped tax legislation over the past several decades is the Congressional Budget and Impoundment Control Act of 1974 (the Budget Act).⁹⁵ The Budget Act established a process whereby Congress sets spending limits and an accompanying revenue target, and then adopts spending measures to fit within those prescribed limits.⁹⁶ The Budget Act also established the Congressional Budget Office (CBO), which along with the Joint Committee on Taxation (JCT) staff is charged with providing budget estimates for

⁹² Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005). See also Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998) [hereinafter Garrett, *Rethinking*].

⁹³ See generally Michael Doran, *Legislative Entrenchment and Federal Fiscal Policy*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 27, 30 (discussing internal rules, which may be classified as soft form or entrenchment, because they can be changed by the legislative body); see discussion *infra* notes 152–155 and accompanying text.

⁹⁴ See generally Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 TAX L. REV. 555 (2014) (explaining the tax policymaking process over the last two decades as characterized by party polarization, consolidation of power in Congress, and less attention to budget constraints); Susannah Camic Tahk, *Making Impossible Tax Reform Possible*, 81 FORDHAM L. REV. 2683 (2013) (arguing that the tax policymaking process is characterized by “legislative paralysis,” and also generally works favorably to well-financed special interest groups); Megan S. Lynch, CONGRESSIONAL RESEARCH SERVICE, *Rules and Practices Governing Consideration of Revenue Legislation in the House and Senate* (Nov. 12, 2015), <https://fas.org/sgp/crs/misc/R41408.pdf>.

⁹⁵ The Budget Concurrent Resolution required under the Budget Act provides instructions to the House Ways and Means and Senate Finance committees on how much revenue should be raised over the budget window, which is currently a 10-year period. See, e.g., Concurrent Resolution for the Budget for Fiscal Year 2017 § 1101(1)(A), <https://www.congress.gov/bill/115th-congress/senate-concurrent-resolution/3/text#toc-ID7C494110A75B45EE89D3A017F0122138>.

⁹⁶ *Id.* § 1101(1)(B); see Megan S. Lynch & James V. Saturno, CONGRESSIONAL RESEARCH SERVICE, *The Budget Reconciliation Process: Stages of Consideration*, (Jan. 4, 2017), <https://fas.org/sgp/crs/misc/R44058.pdf>.

spending measures and revenue estimates for tax measures.⁹⁷ Those budget estimates are critically important to budget reconciliation legislation produced under the Budget Act framework: when Congress sets spending limits for itself, it then relies on CBO estimates to determine whether proposals fall within its prescribed limits—and if not, then Congress cannot enact it as part of the budget process.⁹⁸

Originally, this budget process was designed to control spending, with the expectation that Congress would set budget limits to fit within available revenue, and would use reconciliation procedures to ensure adequate revenue if necessary.⁹⁹ However, in the past two decades the reconciliation procedures became a tool for advancing tax legislation that reduces revenue.¹⁰⁰ This approach was used with the Bush tax cuts in 2001 and with the Tax Cuts and Jobs Act in 2017.¹⁰¹ In each case, the constraints of reconciliation have shaped the substantive tax laws, for example leading to the use of phase-ins and sunsets in the 2001 legislation.¹⁰² The budget framework was intended to make Congress confront tradeoffs in tax and spending legislation, but it can also be seen as increasing the importance of technical analysis in ways that may not be relevant to the policy goals of members of Congress.¹⁰³

⁹⁷ Congressional Budget Act of 1974, Pub. L. No. 93-344, §§ 201, 202, 203, 88 Stat. 297, 302–03 (1974); *supra* note 16.

⁹⁸ This requirement is in part due to a subsequently enacted element of the reconciliation process, known as the Byrd Rule (although it is enacted into law). See Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd’s Eye View*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 105–06 (explaining and using the Tax Cuts and Jobs Act as an example). The Byrd Rule prohibits budget reconciliation bills from increasing the deficit beyond the budget window considered in the budget resolution, among other things. *Id.* at 99; Bill Heniff Jr., CONGRESSIONAL RESEARCH SERVICE, *The Budget Reconciliation Process: The Senate’s “Byrd Rule”* (Nov. 22, 2016), <https://fas.org/sgp/crs/misc/RL30862.pdf>.

⁹⁹ See Lynch, *supra* note 94, at 7; Tonya Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in Congress*, 47 U.C. DAVIS L. REV. 261, 299-303 (2013).

¹⁰⁰ *Id.* at 308–13; cf. Aprill & Hemel, *supra* note 98, at 114 (describing the Senate parliamentarian’s determination in 2001 that reconciliation legislation could be used to enact deficit *increasing* tax cuts, contrary to the original purpose of the Budget Act).

¹⁰¹ See Heniff, *supra* note 98, at 7 (listing all reconciliation bills from 1985 through 2015); Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1020 (2011).

¹⁰² Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335 (2006); Robert McClelland, *Why We Should Stick with a 10-Year Budget Window*, TAX POL’Y CTR. (Aug. 9, 2017), <https://www.taxpolicycenter.org/taxvox/why-we-should-stick-10-year-budget-window>.

¹⁰³ See Aprill & Hemel, *supra* note 98, at 105–06 (describing how points of order are enforced through a process relying on and deferring to JCT and CBO estimates); Abbe Gluck & Jesse Cross, *The Congressional Bureaucracy*, __ U. PA. L. REV. __ (forthcoming 2020). One former Treasury Office of Tax Policy attorney and longtime tax policy insider, John Samuels, summarized one the effect of pay-as-you-go requirements, describing that because “the JCT Staff is the sole and final arbiter of revenue losses from proposed tax cuts and the offsetting revenue gains from proposed tax increases, the Staff wield enormous influence over the design and scope of proposed tax changes.” John

Chamber rules. Tax policy making has been shaped by several specific rules in each house, including debate rules in the Senate that can require 60 votes to proceed to consideration of legislation or to end debate;¹⁰⁴ a former rule in the House that legislation that increases tax rates required a three-fifths majority vote,¹⁰⁵ and Senate precedent on points of order that shape the nature of how the body proceeds under framework legislation.¹⁰⁶

The House of Representatives adopts rules of procedure with each new Congress (*i.e.*, each time that one-third of the Senators are sworn in to begin new terms, which coincides with all members of the House being sworn in). Debate on the floor of the House is shaped by rules established for each piece of legislation by the House Committee on Rules, which is controlled by the Speaker of the House.¹⁰⁷ In the Senate, on the other hand, the rules carry forward into each new Congress without necessarily changing, although they can be modified by a vote of Senators or by establishing new precedent or a new interpretation of existing rules.¹⁰⁸ At the start of each new Congress, each Senate Committee generally adopts its own rules.¹⁰⁹ Most legislation that is debated on the floor of the Senate is considered under a unanimous consent agreement in which

M. Samuels, *The Staff of the Joint Committee on Taxation—From the Outside Looking In* 17–18 (Feb. 2016) (draft prepared for the U.S. Capitol Historical Society’s program on The History and Role of the Joint Committee: the Joint Committee and Public Perceptions), <https://uschs.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Samuels.pdf>.

¹⁰⁴ See Doran, *supra* note 93, at 29 (discussing the Senate filibuster and supermajority requirement).

¹⁰⁵ See Jonathan H. Choi, *Tax Commitment Devices*, 15 J. BUS. & SEC. L. 1, 20–21 (2014); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996) (discussing an earlier iteration of the House three-fifths rule). A version of the rule was in force as recently as 2017. Additionally, the House establishes special rules via the Rules Committee for each piece of legislation it considers. See Lynch, *supra* note 94.

¹⁰⁶ The mechanism by which the Byrd rule (which, again, is actually a statute) is enforced is that a Senator can raise a point of order during consideration of a reconciliation bill to have provisions that violate the Byrd rule struck from the bill (and forbidden from being re-added by amendment). See Heniff, *supra* note 98, at 4–6. The Chair, in consultation with the parliamentarian and based on precedent (with the body able to overrule determinations made by the chair with a 60-member vote), determines whether a point of order is sustained. *Id.* The parliamentarian in turn confers with the Chair of the Budget Committee, and the ultimate arbiter is the cost or revenue estimate prepared by the CBO or JCT staff. Aprill & Hemel, *supra* note 98, at 105–06; see *supra* note 103 and accompanying text.

¹⁰⁷ See *infra* note 224 (discussing the role of the House Rules Committee).

¹⁰⁸ STANDING RULES OF THE SENATE, S. DOC. 113-18 (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf>.

¹⁰⁹ *E.g.*, RULES OF PROCEDURE, COMM. ON FIN., S. PRT. 116-2, 116th Cong. [hereinafter COMM. ON FIN. RULES], <https://www.finance.senate.gov/imo/media/doc/34388.pdf>. One important aspect of the operation of the Senate that is subject to regular changes is the party composition of each standing committee. This is established by Senate Resolution at the start of each Senate. Historically, it has been important whether a committee has, for example, 11 members of the majority and 10 members of the minority party, or a divide like 13 to 8, with the latter making it significantly easier for the majority to control all aspects of legislation reported out of the committee, even when there are some internal disagreements. See, *e.g.*, S. Res. 12, 116th Cong., <https://www.congress.gov/bill/116th-congress/senate-resolution/12>; S. Res. 13, 116th Cong., <https://www.congress.gov/bill/116th-congress/senate-resolution/13>.

the majority leader and minority leader have agreed to the terms of debate and the type and volume of amendments to be allowed.¹¹⁰

To consider the normative implications of framework legislation and rules together as a category, it is instructive to consider a particular limitation on congressional action that has been imposed in both forms recently: the pay-as-you-go (PAYGO) requirement has been imposed both via statute and via rule.¹¹¹ PAYGO has been a recurring influence in tax policy making.¹¹² The details have changed with different iterations of PAYGO, but generally, the mechanism is supposed to protect against increasing budget deficits by requiring that any measure that would increase the deficit must be offset by a spending cut or tax increase.¹¹³ As a result, any form of subsidy necessarily comes at the expense of some other subsidy or requires establishing some source of revenue.¹¹⁴

Reshaping the rules of the game in these ways creates some odd incentives for participants in the decision-making process, and creates opportunities for gaming. Most prominently, the budget effect of provisions subject to PAYGO is calculated by JCT and CBO staff over the course of a set “budget window,” currently 10 years although that could be altered.¹¹⁵ This results in legislative proposals sometimes that are intended to take advantage of the cut-off, perhaps by enacting provisions that will be hard to repeal or by including delayed revenue offsets (sometimes referred to as “pay-fors”) that a subsequent Congress will be inclined to reverse.¹¹⁶ Further, the underlying revenue estimates take on supreme importance. They are prepared by JCT and CBO staff, and

¹¹⁰ See *Glossary Term, Unanimous Consent*, SENATE.GOV, https://www.senate.gov/reference/glossary_term/unanimous_consent.htm (last visited Feb. 24, 2020).

¹¹¹ E.g., Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 1001-508, 104 Stat. 1388. PAYGO was imposed via rule in 2007, when Democrats took over Congress. There are other similar rules as well: for example, the 2009 Budget Resolution added a new point of order in the Senate—like the Byrd rule, but this one is for any legislation that would cause a net increase in the deficit of more than \$5 billion for any ten-year period following the current ten-year period. See Ed Kleinbard, *Tax Expenditure Framework Legislation*, 63 NAT’L TAX J. 353, 363 n.13 (2010).

¹¹² See Daniel J. Hemel, *The President’s Power to Tax*, 102 CORNELL L. REV. 633, 712–13 (2017) (summarizing the on-again, off-again statutory history of PAYGO: it was enacted in 1990, expired in 2000, reenacted in 2002, expired in 2007, and reenacted in 2015, each time in a slightly different form);

¹¹³ Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998); Hemel, *supra* note 111, at 56–58.

¹¹⁴ See Kleinbard, *supra* note 111. Presumably any new source of revenue would be extracted from someone other than the beneficiary of the subsidy—see discussion *infra* Part III.A regarding whose interests are affected by fiscal policy decisions.

¹¹⁵ See Kysar, *supra* note 156.

¹¹⁶ E.g., 26 U.S.C. § 4980I (excise tax on so-called “Cadillac” health care plans, which Congress enacted with a delayed effective date and has continually pushed off so that the tax has never actually been imposed); see generally *What is the Cadillac Tax?*, TAX POL’Y CTR. BRIEFING BOOK, <https://www.taxpolicycenter.org/briefing-book/what-cadillac-tax> (last visited Feb. 19, 2020).

often incorporate assumptions about the effects of the proposal that are highly subjective and the results of which are controlling for the viability of the proposal under PAYGO.¹¹⁷

The PAYGO apparatus illustrates how framework legislation and chamber rules can work to inhibit democratic debate. The budget framework adds complexity and constraints that can hide what Congress is doing and obscure its reasons.¹¹⁸ In ways that are often hidden from the public, framework legislation can shift power and agency from elected representatives to unelected staff. This reduces the possibility of accountability, and fosters lack of responsiveness because the accountable decision makers cannot control the process. The formalities of these rules sometimes are designed to achieve have specific substantive, which means heading off democratic engagement that might deter such outcomes. And those specific ends—deficit reduction in the PAYGO example—effect the winners and losers in legislative wrangling. Further, by channeling policymaking and limiting the options available to Congress, these mechanisms may contribute to legislative inertia and thus favor the status quo.

* * *

Each of these three categories—dramatically broad delegations, independent policymaking commissions, and framework legislation or chamber rules—captures proposals that seek to shape the tax policymaking process in ways that limit who has a say in certain policy decisions, and to preference certain types of arguments over others. Although tax policy is not necessarily a unique venue for these types of proposals,¹¹⁹ the point of highlighting these specific proposals is that this undemocratic impulse is a regular feature of tax policy making. Expert-shaped policy conceived in a setting that is insulated from democratic participation is often emphasized over policy shaped more by public-accountable elected officials or otherwise with public input; decision-making authority would be turned over to experts directly, or by relying on expert-produced constraints to limit the options that elected officials can consider and to channel and constrain public input in specific ways.

Mostly these proposals are justified on tax policy grounds—arguments are made along the lines of: we currently have policies that are inefficient or unsustainable from a budget perspective, we have experts who have better suggestions, and if we shift authority towards those experts or limit the options available to Congress to fit into their prescriptions, tax policy will improve by normative *fiscal policy* measures. The democratic implications of these process adjustments, and

¹¹⁷ This is not to question the efforts of staff working on these revenue estimates, but rather to point out that the revenue estimates shift power to the staff (and away from the elected representatives), but may do so in ways that are obscured from scrutiny. See *supra* notes 103, 106 and accompanying text.

¹¹⁸ See Garrett, *Rethinking*, *supra* note 92, at 425–29.

¹¹⁹ See generally AM. PROSPECT, *The Day One Agenda*, <https://prospect.org/day-one-agenda> (last visited Feb. 19, 2020) (a series of proposals covering various areas of law and policy, including tax law, using existing executive branch authority: “Laws on the books give a president great discretionary power for productive change—without abusing executive authority.”); Ryan Doerfler, *Executive Orders and Smart Lawyers Won’t Save Us*, JACOBIN, <https://www.jacobinmag.com/2019/12/executive-orders-supreme-court-law-college-debt> (attributing proposals for increased executive action to address longstanding policy challenges as a response to congressional gridlock).

the theory that seems to justify these constraints on democratic debates, are considered in the next section.

B. Public Choice Theory as Incomplete Justification

Where have these undemocratic proposals emerged from? In this section, I connect the manifestations of undemocratic impulses described above to public choice theory, a normative framework which has come to dominate many tax scholars' and policymakers' engagement with democratic decision-making structures. As referenced above, one explanation for this reliance on public choice is that the connection between tax and democracy has traditionally been undertheorized—tax theory focuses on other normative values (e.g., efficiency and distributional equity), and democratic theorists have been largely disinterested in public finance.¹²⁰ As discussed below, public choice bridges these distinct spheres, but this section critiques public choice analysis as providing an incomplete account of democratic concerns that is fundamentally critical of democratic decision making.

In applying economic analysis to collective decision making,¹²¹ the public choice approach generally casts the various players in the political system as rational and self-interested participants in a market.¹²² It diagnoses that legislative action or inaction is a result of decision makers responding to incentives.¹²³ In the simplest case, elected representatives seek votes and financial support to help them win reelection, and thus will work to advance policy measures that are popular with their voting constituents or that yield contributions to their campaigns. This logic is extended to other decision makers as well—bureaucrats can be “captured” by the promise of future personal financial gains, for example.¹²⁴ Although money is an important impetus for action in public choice models, the models can incorporate some complexity and nuance in actors' motivations. Politicians may be motivated by notoriety, prestige, or advancing their own beliefs,¹²⁵ and voters may act out of self-interest, or they may be motivated by ideology or to carry out some expressive purpose.¹²⁶

¹²⁰ Cf. McCaffery, *supra* note 41; *infra* note 156 and accompanying text.

¹²¹ See generally Tollison, *supra* note 18; Posner, *supra* note 18.

¹²² Daniel A. Farber & Anne Joseph O'Connell, *Introduction: A Brief Trajectory of Public Choice and Public Law*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 1 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (introducing these “basic economic principles [as applying to] to any public institution, whether formally political or not.”).

¹²³ *Id.*

¹²⁴ Tollison, *supra* note 18.

¹²⁵ Farber & O'Connell, *supra* note 122.

¹²⁶ *Id.*

Various elements of public choice taken together form a fairly biting descriptive critique of democratic governance. Gordon Tullock argued that democratic decision making by majority coalitions necessarily results in flawed fiscal policy.¹²⁷ The basic problem Tullock describes is vote-trading to facilitate pork barrel spending, with the vast majority of the tax burden for such spending falling outside of any individual voting district in which the spending is to occur—thus, runaway spending without regard for tax burdens.¹²⁸ The remedy in the public choice framework is to constrain democratic decision processes so that results hew closer to some expert-determined set of outcomes.

James Buchanan extended the concern for excessive public spending into an argument that “scientific” analysis of fiscal policy should take place “before” consideration of moral arguments about redistribution—an attempt to filter the options available for normative analysis through some preceding technical analysis.¹²⁹ The examples of the undemocratic impulse described in the previous section are manifestation of Buchanan’s vision. Under the Budget Act, for example, the “technical work” of estimating the budget effect of tax and spending measures generally must be completed before any political (normative) debates about those measures.¹³⁰ Measures considered by the tax committees in Congress generally must first be vetted and scored by the JCT. This is the case because of the way congressional consideration of tax and spending measures is generally structured in the legislative process: under budget reconciliation, committees are charged with setting spending targets, and then with authorizing specific appropriations. This results in substantive debates about policy measures largely taking place with the constraint of predetermined spending limits. PAYGO imposes budget limitations that have a similar result.¹³¹ In practice, the democratic decision-making process is circumscribed by technical limitations that themselves have normative implications.¹³²

Public choice produced further indictments of and attacks on democratic decision making, as well. Kenneth Arrow theorized that majoritarian preferences are unstable and thus a decision adopted by a majority coalition reflects, at best, fleeting preferences, and in the more strongly

¹²⁷ Gordon Tullock, *Problems of Majority Voting*, 67 J. POL. ECON. 571 (1959); see Tollison, *supra* note 18, at 354–55; JAMES M. BUCHANAN & RICHARD E. WAGNER, *DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES* (1977).

¹²⁸ Tullock, *supra* note 127.

¹²⁹ JAMES M. BUCHANAN, *PUBLIC FINANCE IN DEMOCRATIC PROCESS: FISCAL INSTITUTIONS AND INDIVIDUAL CHOICE* 226 (1967) (normative discussions of progressive taxation should “be postponed until analysis on a prevalue basis is fully exhausted.”).

¹³⁰ See *supra* notes 95–98.

¹³¹ *Supra* notes 111–117.

¹³² For example, different assumptions about the behavioral changes resulting from changes in tax policy can have enormous effects on budget estimates. For example, the extent that raising the capital gains rate will prompt owners of built-in gain property to realize gains in the period before the rate increase, and to extend holding periods once the rate change is in place, involves significant guess work that can implicate prior normative commitments. Thus, both the budget scoring process and the political debate that follows the scoring process implicate the normative question: to what extent are marginal capital gains rates a significant factor in investment behavior? See generally CONG. RESEARCH SERV., R41364, *CAPITAL GAINS TAX OPTIONS: BEHAVIORAL RESPONSES AND REVENUES* (Apr. 30, 2019), <https://fas.org/sgp/crs/misc/R41364.pdf>.

critical version is simply meaningless.¹³³ Other public choice scholars argue that voters are woefully under-informed about the array of issues that might affect their votes, and rationally should remain so because their votes are so unimportant and information costs are so high.¹³⁴ Public choice also anticipates that interest groups will flourish because individual voters dither and lack influence.¹³⁵ Interest groups facing concentrated costs or benefits as a result of a possible policy change are particularly incentivized to form and act—public choice models that those groups will be able to organize and effectively push their political agendas, whereas groups facing costs and benefits that are spread more diffusely will face coordination problems organizing a response.¹³⁶ Delegations to agency experts, super committees and the like offer ways to bypass these problematic aspects of democratic decision making.

The coda to these critiques is Buchanan and Tullock’s argument that legitimate decision making requires consent from all, i.e., unanimity, rather than majoritarian rule.¹³⁷ This is a significant departure from mainstream democracy scholarship that, across a wide range of competing theories of democratic decision making, embraces majoritarianism.¹³⁸

The public choice turn away from democratic modes of decision making has normative implications, some of which are explicit and some of which are obscured from view.¹³⁹ Nonetheless, this public choice framework has aspects that appeal across the political spectrum currently: it speaks to people who identify as politically conservative and who are concerned that the tax policymaking process could be dominated by lower-income or lower-wealth majorities who want to tax the rich. And it speaks to people who identify as politically liberal or progressive, who are concerned that the tax policymaking process is dominated by well-resourced interest groups.

Based on these particularly undemocratic arguments advanced by public choice luminaries, Dan Shaviro describes a “reductive” version of public choice theory that has taken root in some legal scholarship.¹⁴⁰ In this version, the “public is not only ignorant, but irrelevant. Interest groups are all powerful and concerned only with monetary wealth. Politicians are not only self-interested,

¹³³ KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

¹³⁴ JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

¹³⁵ James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357 (James Q. Wilson ed., 1980).

¹³⁶ *Id.*

¹³⁷ BUCHANAN & TULLOCK, *supra* note 134.

¹³⁸ See, e.g., AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 2 (2d ed. 2012).

¹³⁹ Cunningham generously refers to public choice theory the “catallactic” theory of democracy, i.e., focused on trade. FRANK CUNNINGHAM, THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION 101–22 (2001).

¹⁴⁰ 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. PENN. L. REV. 1, 66 (1990).

but narrowly so; they are literally for sale.”¹⁴¹ The popular appeal of this limited version of public choice is probably aided by frequent *apparent* (but only anecdotal) confirmations: politicians are, indeed, constantly raising money for reelection; rich interest groups and corporations are, indeed, constantly spending money on lobbying; the appearance of impropriety is ubiquitous, and occasionally a group of politicians are caught in a direct quid pro quo scheme.¹⁴² These concerns, and the charge that powerful special interest groups have run rampant, appears to be especially true with regard to tax legislation, as it seems to explain the swiss-cheese nature of the current federal tax base.¹⁴³

Shaviro and others object to the public choice framework by explaining that some of its assumptions and conclusions have been refuted empirically.¹⁴⁴ To name a few specific examples, tax policy over the past four decades has been characterized by under-taxation—i.e., not raising enough revenue, and instead relying on deficit spending—rather than the over-taxation that Buchanan anticipated.¹⁴⁵ Similarly, enacted preferences tend to be sticky, not to “cycle” through unstable majority coalitions as predicted by Arrow’s Theorem.¹⁴⁶ Nonetheless, the undemocratic proposals discussed above can be understood as responsive to concerns about capture by interest groups that echo the reductive public choice theory Shaviro identified, and that accept the thrust of public choice work that is so highly critical of democratic decision making.

But there are reasons to be particularly skeptical of public choice as applied to tax policy making. Tax lawmaking involves a complicated mix of pressures and motivations, including money in politics and interest group influence, and also differing ideological commitments and differing views of the public good, and other goals like self-aggrandizement and publicity seeking by politicians. The relative weight and importance of these factors are obscured because attempts by various players to satisfy these different motivations are manifested in different ways, some

¹⁴¹ *Id.*; see also STEINMO, *supra* note 39, at 4 (citing James Alt, *The Evolution of Tax Structures*, 41 PUB. CHOICE 181 (1984); LOUIS EISENSTEIN, *THE IDEOLOGIES OF TAXATION* (1961)).

¹⁴² See, e.g., Kenneth P. Vogel & Jim Tankersley, *With Billions at Stake in Tax Debate, Lobbyists Played Hardball*, N.Y. TIMES (Dec. 16, 2017), <https://www.nytimes.com/2017/12/15/us/politics/lobbyists-tax-overhaul-congress.html>.

¹⁴³ See Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891 (1987) (providing a public choice, lobbying based explanation for the compromises in the 1986 act). Shaviro critiques Doernberg and McChesney for adopting an oversimplified model (“legislation as contract,” which consists of lawmakers selling outcomes for campaign contributions), and relying on incomplete evidence to validate the model, because they cherry-picked specific provisions from the Tax Reform Act of 1986 to prove their points, but fail to explain the many other provisions that seem contradictory to their model. Shaviro, *supra* note 140, at 71–77.

¹⁴⁴ E.g., Shaviro, *supra* note 140 (summarizing empirical refutations); Ian Shapiro, *Why the Poor Don’t Soak the Rich*, 131 DÆDALUS, Winter 2002, at 118, 118; STEINMO, *supra* note 39, at 4.

¹⁴⁵ As Sheffrin summarizes: “The United States and other mature economies face persistent fiscal problems” in which demands for spending “outstrip the apparent willingness of the public to levy taxes to pay for these goals.” SHEFFRIN, *supra* note 22, at 1.

¹⁴⁶ See Farber & O’Connell, *supra* note 122, at 3.

effective and some less so.¹⁴⁷ Concluding that specific policy outcomes are a result of vaguely specified inputs with an assumption of uniform responses is simply misleading.¹⁴⁸

Further, there are reasons to think that tax legislation at least has the potential to be less prone than other areas of lawmaking to be captured by special interests. Edward Zelinsky has argued that the federal tax law making process is comparatively well-suited to resist capture and focus decision makers on appropriate trade-offs, because so many diverse interests are affected by tax policy making.¹⁴⁹ The result is that tax policymakers may be less susceptible to fall into the thrall of a narrow set of interests than, say, members of Congress serving on one of the Armed Services committees.¹⁵⁰ Still, public choice theory is the dominant framework for considering connections between tax policy and democratic policymaking institutions.¹⁵¹

Describing the manifestations of public choice theory as undemocratic finds some support in the literature on entrenchment, which queries whether and the extent to which it is normatively desirable and constitutionally permissible for a current Congress to take action that limits and binds a future Congress’s lawmaking powers.¹⁵² A common view in the entrenchment literature is that hard entrenchment—rules to truly bind and limit the decisions available to a future Congress—is

¹⁴⁷ Shaviro, *supra* note 140; Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993).

¹⁴⁸ Shaviro points out that this is exactly what Doernberg and McChesney did in examining the Tax Reform Act of 1986. Shaviro, *supra* note 140, at 75.

¹⁴⁹ Zelinsky, *supra* note 147, at 1178. The tax committees in Congress often combines different issues affecting a variety of interests in a single piece of legislation. *See* Wallace, *supra* note 48, at 213.

¹⁵⁰ In other work, Shaviro takes a different view than Zelinsky, arguing that tax debates, as with other legislative debates that center on distributional issues, are subject to “particularly destructive interest group influence.” DANIEL SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* 87 (2000).

¹⁵¹ There are also public choice approaches to tax policy making that are not skeptical of democratic input. For example, Susannah Camic Tahk builds on the Wilson interest group taxonomy to argue that earmarked taxes can help to overcome the perception of tax revenue generally having diffuse benefits. Susannah Camic Tahk, *Public Choice Theory and Earmarked Taxes*, 68 TAX L. REV. 755 (2015); *see also* Kysar, *supra* note 156.

¹⁵² *See* Doran, *supra* note 93, at 43 (characterizing Congress’s internal rules and practices as a form of “incidental soft entrenchment” that can nudge future Congresses in certain substantive directions, but do not bind future Congresses and often seem to nudge inadvertently); Amandeep S. Grewal, *Legislative Entrenchment Rules in the Tax Law*, 62 ADMIN. L. REV. 1011 (2010) (considering various statutory drafting techniques as forms of legislative entrenchment, and identifying specific instances of entrenchment that have caused controversy in the tax laws). Entrenchment literature developed out of the prevalent concern in the early 1980s about deficit spending and the federal debt. Congress enacted the Gramm-Rudman-Hollings Act (formally, the Balanced Budget and Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038), which enforced automatic spending reductions if spending exceeded prescribed limits. The mechanism for imposing the spending cuts was determined by the Supreme Court to be unconstitutional. *Bowsher v. Synar*, 478 U.S. 714 (1986).

both undesirable and unconstitutional.¹⁵³ The analysis underlying this conclusion is most concerned with protecting democratic norms such as democratic accountability.¹⁵⁴ Others have disagreed on normative and constitutional grounds, but there is little debate that to the extent a previous iteration of Congress makes decisions that bind a future Congress, that limitation has democratic valence, an insight that is missing in much consideration of undemocratic impulse proposals.¹⁵⁵

From time to time, tax scholars have observed a democratic void in tax policymaking. Ed McCaffery lamented that tax law has become “the beast of our democratic belly,” which we have haphazardly allowed to “be constructed by self-interest” rather than making “a more vigorous interpretive turn in tax policy scholarship” that might have brought real engagement between tax law and democratic theory.¹⁵⁶ The normative underpinnings of the undemocratic proposals for tax policy making are incomplete at best. Public choice theory offers a particular lens that is skeptical of democratic decision making, especially with regard to taxation. The next Part introduces a framework for *democratic* consideration of tax policy.

III. A FRAMEWORK FOR DEMOCRATIC TAX POLICY MAKING

The public choice literature and the various proposals to fix and shape tax policymaking disregard an important function of democratic decision making. The focus in that literature and in the undemocratic impulses examined above is on the results; there is little or no appreciation of the value of the process. But, as Amy Guttmann succinctly explained, “democracy is valuable for far more than its capacity to achieve correct outcomes.”¹⁵⁷

Focusing on process is notably important in the context of tax policy making, where there is empirical evidence that when regular taxpayers (i.e., non-experts) consider tax fairness, they are more concerned about process and procedure than distributional outcomes.¹⁵⁸ By emphasizing

¹⁵³ Doran, *supra* note 93.

¹⁵⁴ John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773 (2003) (arguing the entrenchment is both unconstitutional and undemocratic); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 418–19 (2015) (summarizing the debate among constitutional scholars).

¹⁵⁵ Cf. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73 (2002) (defending entrenchment despite the democratic limitations because it allows decision makers to manage the policymaking agenda, and promotes stability of enacted policies and in policymaking institutions).

¹⁵⁶ McCaffery, *supra* note 41, at 93. Other scholars have observed the challenge of considering governing context in addressing tax policy as well. *E.g.*, Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 619 (1995); Kysar, *supra* note 102, at 339 (identifying “the underdeveloped academic field of the politics and processes of tax policy” as compared to the “traditional model for tax law review articles, which analyze[] the substance of tax policy.”); PATRICIA APPS, A THEORY OF INEQUALITY AND TAXATION ix (1981) (distinguishing between distribution of income and distribution of power).

¹⁵⁷ AMY GUTTMANN, DEMOCRATIC EDUCATION 96 (1987).

¹⁵⁸ SHEFFRIN, *supra* note 22, at 3, 18. Sheffrin generally focuses on the public’s opinions on tax policies and perceptions of fairness in different tax policy contexts, detailing how public sentiments—i.e., folk justice—diverges

procedural fairness in adopting tax rules, this Part seeks to advance a concept of democratic legitimacy for tax policymaking and to prescribe guideposts for determining and designing conditions, institutions and practices from which democratically legitimate outcomes can emerge.¹⁵⁹ Thus, the focus is on *who* is included in the tax policymaking process, and *how* those participants engage with each other in the decision making process.

This Part introduces a two-part framework for democratic tax policy making, focused on the *process* of enacting *democratically legitimate* tax policy. The framework draws on Ian Shapiro’s work on democratic justice, which focuses on managing power dynamics within decision making institutions as central to ensuring democratic legitimacy.¹⁶⁰ The framework is intended to be consistent with a range of schools of democratic thought,¹⁶¹ in part because the contextual nature of democratic justice allows that there will be significant variation in the particulars of the democratic processes that are necessary or appropriate in order to provide a sufficient foundation for democratic legitimacy for different decisions.¹⁶² The focus in this Article is on the particular context of tax policy making in the U.S. at the federal level (thus, the discussion incorporates the representative constitutional structure and existing tax policy making institutional arrangements).¹⁶³ Still, these guideposts are applicable in other contexts as well.¹⁶⁴

from expert opinions. *E.g., id.* at ch. 2 (doing this with regard to property taxes); *id.* at ch. 3 (with regard to income tax progressivity and estate and gift taxes).

¹⁵⁹ The framework introduced here is agnostic as to substance; however, I reserve the challenge of extending the democratic justice framework to consider substantive concerns for later work. *See infra* Section IV.C, which introduces some of the substantive implications of the framework.

¹⁶⁰ Although Shapiro is skeptical of some fundamental aspects of American democracy—its representative structure and focus on judicial review as a way to protect minority rights—he is also a committed to adaptive political theory, i.e., a pragmatic form of political theory that is applicable to real-world challenges. *See infra* note 213.

¹⁶¹ *See supra* note 25 (comparing the minimalist competitive democratic model with, for example, civic republican and deliberative models that call for more involved and widespread citizen engagement).

¹⁶² *Id.*

¹⁶³ This Article does not address related issues such as campaign finance and election reforms, although such reforms target some of the same issues considered in the framework introduced here. *See, e.g.,* Samuel Issacharoff, *Democracy’s Deficits*, 85 U. CHI. L. REV. 485, 488 (2018) (describing key problems of democracy as including the “decline of political parties,” and “paralysis of the legislative branches” and considering various structural political reforms); FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, *RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF* (2018) (focusing on the decline of political parties, and comparing various electoral systems).

¹⁶⁴ *See SHAPIRO, supra* note 23, at 34–37. While consideration of democratic values has been largely lacking in federal tax policy discourse, it is more prevalent at the state and local levels, *e.g.,* Kleiman, *supra* note 16, and in the international context, *e.g.,* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1625–31 (2000) (discussing the implications on democratic governance of various equity and efficiency arguments in international taxation). The framework introduced in this Part might seem to look favorably on decision making via referendum or ballot initiative, because of the broad opportunities for inclusion, but

In Section A, below, I argue that in light of the broad reach of the U.S. federal tax system, tax policymaking processes should be broadly inclusive in accordance with the principle of affected interests. In Section B, I make the case for non-domination in the tax policymaking process as a second precept for democratically legitimate tax policy making, and recommend an iterative process, i.e., a process that repeats so that losers can become winners and winners can become losers.

A. *Affected Interests*

A fundamental tenet of democratic decision making is that “anyone who is affected by a decision should have a say in making the decision.”¹⁶⁵ This is known as the principle of affected interests.¹⁶⁶ It follows quite simply from the most basic conception of democratic governance as government by the people over themselves. In his argument for democratic justice, Shapiro describes the challenge of determining the “appropriate demos for particular decisions,” and argues that “much of settling who should be entitled to decide what is a matter for contextual analysis.”¹⁶⁷ In federal tax policy in practice, access to decision making is often limited in myriad ways as exhibited with the legislative process for the Tax Cuts and Jobs Act,¹⁶⁸ and various proposals considered in Part II seem undemocratic in part because of how those proposals might exclude affected interests from decision making. But achieving broad participation in policy making consistently over time has proven to be exceedingly challenging.¹⁶⁹

The principle of affected interests is generally an inclusive rule—it says that a decision-making process should not exclude relevant people. Hence, where implications of a decision are far-reaching, broad participation is an important aspect of “establishing a fair or legitimate process for

the domination concern in those decision-making processes is acute and my inclination is that it militates in favor of decision making via representatives. The framework and the prescriptions that follow are flexible enough to fit a variety of contexts, including state legislative decision making and state or local ballot initiatives, but the application of the framework to state and local decision making structures requires further attention. Note, however, that in direct democracy systems, the benefits of democratic engagement may be overwhelmed by the potential for capture, incoherence, and inattentiveness by unaccountable individuals who are not subject to mechanisms to ensure their own transparency and accountability. See, e.g., Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 547–48 (2002) (elaborating on these risks and arguing that they militate in favor of representative democracy with transparency and mechanisms to hold representatives accountable).

¹⁶⁵ Fung, *supra* note 28, at 236; See Kay Lehman Scholzman et al., *Inequalities of Political Voice*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 19 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (giving citizens affected by democratic decisions a say is “essential to democratic governance”).

¹⁶⁶ *Id.*

¹⁶⁷ SHAPIRO, *supra* note 24.

¹⁶⁸ See *supra* notes 2-4 and accompanying text.

¹⁶⁹ See KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012) (focusing on unequal participation via organizations); SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995) (showing and examining unequal participation as between individuals).

making decisions.”¹⁷⁰ An inclusive application of the concept of affected interests has been used as a justification for the expansion of the franchise, as when the Supreme Court struck down a state law that limited voting in school district elections to parents of children in the public schools and certain residents of the district.¹⁷¹ But in some circumstances the principle of affected interests has been used to justify exclusion, such as where the Court has determined that *only* landowners have significant interests in particular issues.¹⁷²

In many contexts, the question of whose interests are affected is murky. Consider K-12 education decisions.¹⁷³ It seems clear that parents whose children attend the public schools at issue should have a say, but the connection grows more attenuated parents of younger kids not yet in school, older kids who have graduated, kids who attend private schools, and non-parents. It perhaps is even more attenuated for people who do not reside in the school district, although some of those people might argue that the way that their sort-of-near neighbors are educated is relevant to their interests.¹⁷⁴

Thus it is easy to anticipate disagreement about what constitutes a strong enough interest to call for a seat at the democratic decision making table. Indeed there is some disagreement across different theories of democracy as to how far the principle of affected interests should extend related to what inclusion should entail.¹⁷⁵ Shapiro’s democratic justice concept queries whether a person’s “basic interests” are implicated in a decision-making process.¹⁷⁶ These basic interests are very broadly defined to mean anything that affects peoples’ abilities to “survive and thrive” in their society and in the economy their society creates, over the course of their lifetimes.¹⁷⁷ Shapiro has argued that the best definition of basic interests should be generalized rather than delving into each individual’s particular concerns and passions to determine what he or she really cares about. Shapiro therefore proposes that in some contexts basic interests can be converted into resources,

¹⁷⁰ GUTMANN & THOMPSON, *supra* note 25, at 27.

¹⁷¹ *E.g.*, *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969).

¹⁷² *E.g.*, *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (permitting restricting the franchise to landowners for vote on directors of a water storage district); *Ball v. James*, 451 U.S. 355 (1981) (similar).

¹⁷³ *See Kramer*, *supra* note 171.

¹⁷⁴ *See GUTMANN*, *supra* note 157; *DEWEY*, *supra* note 181; *supra* note 171.

¹⁷⁵ On the very far end of the deliberative spectrum, Jürgen Habermas’s theory of discourse ethics relies on universal participation as a precept for his theory of discourse. *See JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 93 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT, 1990) (1983); *see also JÜRGEN HABERMAS, PHILOSOPHICAL INTRODUCTIONS: FIVE APPROACHES TO COMMUNICATIVE REASON* 33 (Ciaran Cronin trans., Polity Press, 2018) (2009) (introduction by Jean-Marc Durand-Gasselín). *See also* ARISTOTLE, *POLITICS* bk. V, pt. VIII (advocating broad inclusivity).

¹⁷⁶ SHAPIRO, *supra* note 24, at 172,

¹⁷⁷ *Id.* at 230 n.42.

which could include money and also property or services.¹⁷⁸ This approach preempts the problem of determining what precisely constitutes a basic interest and what does not, and a resource-based approach is particularly fitting with regard to tax policy. An aspiring musician might deem a guitar to be a basic interest, to the detriment of satisfying other material needs, for example. Shapiro's democratic justice is not concerned with determining whether an interest in a guitar raises democratic institutional concerns. Rather, democratic justice applied to the individual is focused on the resources that allow the musician to buy a guitar, or shelter, or something else that individual needs to advance the interests that are basic to her specifically.

Confronting who is to be included in a democratic decision making process raises the question of the purpose of participation.¹⁷⁹ Some argue that democracy should seek to simply "aggregate" community members' preferences.¹⁸⁰ Applying the principle of affected interests to an aggregative approach suggests relatively few procedural demands and few demands on individual participants—they can register their (pre-existing) preferences, and if those preferences are germane they should be included. On the other hand, if democratic decision making aspires to *shape* a concept of the "common good," as deliberative democrats contend, that would demand more of democratic institutions and participants, and is also more demanding of those participants.¹⁸¹

Note that these two poles are both focused on outcomes. An alternative is, again, to focus on the process itself: participation itself is valuable.¹⁸² A process-based approach focuses on "the ability to express views or convey one's story" in the decision making process, a concept sometimes referred to as "voice."¹⁸³ Having a say is important because of the content—voice allows "citizens communicate information about their preferences and needs"¹⁸⁴—and because participation might "confer on the individual the dignity that comes with being a full member of the political community," which in itself is an important interest.¹⁸⁵ If the purpose of participation is voice, then inclusion should be a sort of rebuttable presumption, whereby any degree of interest

¹⁷⁸ Shapiro, *supra* note 33. This analytical approach traces the move made by others: welfarists using income as a proxy for endowment, and some prominent egalitarians focus on resource equality as a proxy for equality of opportunities. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000).

¹⁷⁹ See *supra* note 175 (discussing Habermas in this connection).

¹⁸⁰ See SHAPIRO, *supra* note 24, at 11–14 (examining alternative concepts of the function of democratic debate and tracing the aggregative approach to Rousseau's *Social Contract*).

¹⁸¹ See GUTMANN, *supra* note 157; see also GUTMANN & THOMPSON, *supra* note 25 (arguing in favor of a deliberative model of democracy); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (1954).

¹⁸² Cf. *supra* note 175.

¹⁸³ SHEFFRIN, *supra* note 22, at 41. Sheffrin describes that "voice is closely related to political accountability and the nature and structure of democratic systems." *Id.* at 168.

¹⁸⁴ See Scholzman *supra* note 165, at 19.

¹⁸⁵ SHEFFRIN, *supra* note 22, at 168.

in the decision is sufficient to justify inclusion as a preliminary matter.¹⁸⁶ Basic interests are then clearly sufficient whereas lesser interests could be rebutted and require less attention via whatever mechanisms are used to promote inclusion.

Returning to the K-12 education example, this concept of basic interests instructs that some school district decisions affect some peoples' ability to survive and thrive (children, taxpayers) but not others (non-taxpayers who do not have children in the schools), but the starting point is a presumption that all community members should be included.¹⁸⁷

How does the principle of affected interests apply to tax policy? Everyone in the community has individual interests potentially affected by tax policy directly in fiscal terms, *i.e.*, in terms of money in their own pockets, now or maybe later. For some people, small changes in tax liability will constitute basic interests in which case it is very important to ensure they can participate. For others, large changes in tax liability will *not* constitute basic interests. Consider the question of whether to increase or decrease taxes on the wealthiest person in the world, Jeff Bezos, founder of Amazon.¹⁸⁸ For this and related examples that follow, assume two time periods—now and later—and three types of taxpayers, group A, Bezos, and group C. Because the U.S. currently runs a budget deficit, cutting Bezos' taxes now would increase the federal debt, which must be paid off later. The standard view is that debt must eventually be paid off, either by current taxpayers (offset by increased taxes in the current time period, or repaid by tax revenue collected in some later time period), or by future taxpayers (who do not exist yet, but will exist by the time the debt must be repaid).¹⁸⁹

If debt is borrowed from others in the U.S., then repaying the debt later simply shifts money within the economy but does not reduce future consumption overall. If Bezos uses his tax cut to buy U.S. Treasury notes (*i.e.*, debt of the federal government), he is foregoing additional consumption in one time period to lend money to the government, but is able to increase consumption when the government uses additional tax revenue in the future to repay the debt later. Essentially Bezos is borrowing from himself, and if the later tax increase is equal to the current tax reduction, he breaks even. But if Bezos gets a tax cut now and some other taxpayers funds it

¹⁸⁶ A more expansive approach to participation in democratic decision making is that *every* member of the community should be included, regardless of their particular interests. SHAPIRO, *supra* note 23, at 38 n.21 (attributing this view to Rawls and other liberals, and “communitarians,” *e.g.*, Walzer).

¹⁸⁷ *Cf.* Kramer, *supra* note 171.

¹⁸⁸ Jessica Guynn, *Amazon's Jeff Bezos, already the wealthiest person on the planet, just got billions richer*, USA TODAY (Jan. 30, 2020), <https://www.usatoday.com/story/tech/2020/01/30/amazon-jeff-bezos-even-richer/2859459001/>; recently various Democratic presidential candidates offered proposals to increase Bezos tax liability via a wealth tax, and the Trump administration offered a proposal to reduce Bezos' tax liability by reducing capital gains rates.

¹⁸⁹ See JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 105-08 (4th ed. 2013) (discussing the concept of “intemporal budget constraint”).

by purchasing U.S. Treasury notes, and then when it is time to repay those notes later the government increases taxes on those other taxpayers, those taxpayers lose. The same is true if taxpayer group A lends money now to the government to fund the Bezos tax cut, and later the government increases taxes on taxpayer group C: group A breaks even (having lent money and been repaid), and Bezos has more than he would otherwise, at the expense of group C. Bezos and Group A are clearly implicated in the first time period, Bezos by the tax policy and Group A by their own decision to lend money, but group C is not implicated until later, when it is time to repay the debt.

If new debt is borrowed externally, for example from foreign individuals or governments, then repaying the debt will reduce future domestic consumption. In this scenario, there is no group A—instead of spending tax dollars on public goods or transfers that are spent here, tax dollars directed to debt repayment will leave the U.S. economy to repay money already spent. If that happens, the burden of current debt-financed spending is borne by future taxpayers or current taxpayers in a future time period (Bezos, if his taxes are subsequently increased, or group C, perhaps). This standard analysis thus suggests that any reduction in revenue to benefit Bezos has potential financial repercussions for other taxpayers.¹⁹⁰

However, note that this analysis assumes that debt must eventually be repaid, and that the only source of repayment is tax revenue.¹⁹¹ If debt is never repaid, but rather can be refinanced at interest rates lower than the rate of growth, then the ratio of debt to gross domestic product (i.e., the standard measure of overall debt burden) will decrease without increasing tax revenue to pay off debt.¹⁹² If this is the case, then debt-financed government tax cuts for Bezos now may *not* require increased tax revenue from Bezos or others in the future.

In sum, when the government is operating with budget deficits, it is unclear at the time new debt commitments are made the extent to which additional debt obligations implicate other taxpayers who may have to pay back the debt later. Further, if debt must be repaid, the question of which particular taxpayers will bear the burden is contingent on political decision making in

¹⁹⁰ Some recent tax policy analysis has approached debt-financed tax cuts in this manner. *E.g.*, William G. Gale, Hilary Gelfond, Aaron Krupkin, Mark J. Mazur & Eric Toder, TAX POL'Y CTR., *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis* (June 13, 2018), https://www.taxpolicycenter.org/sites/default/files/publication/155349/2018.06.08_tcja_summary_paper_final.pdf (“If it is not financed with concurrent spending cuts or other tax increases, TCJA will raise federal debt and will impose burdens on future generations. If it is financed with spending cuts or other tax increases, TCJA will, under the most plausible scenarios, end up making most households worse off than if it had not been enacted.”).

¹⁹¹ What follows is a developing view of the relationship between debt and economic growth; the possibility discussed here that debt has little or no fiscal cost is not to be confused with the so-called “Modern Monetary Theory” that has taken root in some circles, which reaches a similar conclusion by way of assuming that governments can produce unlimited supplies of currencies not backed by assets—i.e., a government can print more money if it needs to, so debt is cost-free. This modern monetary theory view essentially ignores the inflation risk. *See* Paul Krugman, *What's Wrong With Functional Finance*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/opinion/whats-wrong-with-functional-finance-wonkish.html>.

¹⁹² Olivier Blanchard, *Public Debt and Low Interest Rates*, 109 AM. ECON. REV. 1197 (2019); *see also* GRUBER, *supra* note 189 (specifying that current government debt acts as a constraint on government spending to the extent that it must be repaid).

subsequent time periods. Identifying the *potentially* affected interests at the time the fiscal policy decision to increase debt is made is relatively simple: it could be anyone. Identifying the actually affected interests is impossible: the cost may be borne by no one, or it may depend on future events.

Additionally, even if a tax cut for Bezos does not mean that some other taxpayer will have increased tax liability (now or in the future), there are other implications for groups A and C. There are opportunity costs to the tax cut for Bezos: it is reduced revenue to the government that does not go to some other taxpayers' pockets or is not used to fund potentially beneficial government investments. It also occupies congressional lawmaking effort, thus distracting from other potential priorities. And there is a distributive effect of Bezos' share of the after-tax distribution of resources and everyone else's share relative to Bezos.¹⁹³ There is significant contextual variation in the extent to which distributional equity is meaningful to individuals, and many distributional effects may not rise to the level of affecting basic interests. For example, Warren Buffet may care about his wealth relative to Bezos, but even if a particular flavor of tax cut is more beneficial to Bezos than to Buffett, it is hard to make the case that any such difference could affect Buffett's ability to survive and thrive. That is, Buffett being in a worse tax planning position as between two billionaires may strike him as unfair, but it may not implicate any of his resource oriented basic interests. On the other hand, Warren Buffet's office assistant may be more concerned with his or her position relative to others in the office, or others in his or her neighborhood in Omaha, Nebraska, for example. For those with fewer resources at their disposal—lower incomes or little wealth—small changes in relative distribution may indeed meaningfully implicate their ability to thrive.

Finally, given the ambiguity in who might be implicated in the future in dollar terms by any decision made now, the concept of voice seems especially important. In the internal lending example, group A (who lends money to the government) has some autonomy on account of deciding to lend money; Bezos has some tangible benefit in the form of a tax cut (and possibly has some voice in the process to facilitate becoming a beneficiary of the tax cut). Group C, on the other hand, is the loser, and if the members of group C must later pay increased taxes that divert resources from their basic interests, then they should have a voice in the process. If they do have a voice they may well feel vindicated by the fact of their participation, even if their basic interests are nonetheless threatened by the outcome.¹⁹⁴

¹⁹³ There is plenty of room for debate about the extent to which the current federal budget posture of deficit spending actually means that some future taxpayers will foot the bill for debt accrued now. However, it is beyond debate that some of the taxes paid by current taxpayers are devoted to paying interest on current debt, and if current deficits were reduced (e.g., by taxing Bezos more now), then in the near future less tax revenue would need to be spent on interest payments.

¹⁹⁴ See SHEFFRIN, *supra* note 22.

Again, analysis of who is included in the affected interests is contextual—it depends on the nature of the decision, opportunity costs associated with Congressional action, and the direct and indirect consequences that follow from the decision. Considering the potential effects of changes in tax policy together, it seems that *every* member of the democratic community has some interest that are potentially affected by changes in tax policy. These potential interests may not actually be affected, and they may not rise to the level of basic interests. The rebuttable presumption approach suggests that all interests should be presumed necessary to include.

The basic interests concept can refine this somewhat: taxpayers whose livelihood is protected need not be concerned. The question then becomes: what are the resource thresholds above which basic interests are not threatened, and are there mechanisms by which some taxpayers' basic interests can be protected from being implicated in the future by decisions made now? Part IV provides some recommendations for the U.S. federal tax policy making process. The next section explores how to mediate decision making as between those who are included in the process.

B. *Non-Domination*

Broad participation alone is not sufficient to make policy outcomes democratically legitimate.¹⁹⁵ To advance the goal of democratic legitimacy, the decision making process—tax policy making—should be designed to feature *non-domination* among participants. The general idea is that in order for decision making institutions that are appropriately inclusive to yield democratically legitimate results where important issues are at stake, none of the participants should have outsized influence on those results to the detriment of other participants.¹⁹⁶

The goal of this Section is to outline a concept of non-domination for the tax policymaking process to provide guideposts that can “shape the terms” of interactions in that process without necessarily “determining the course.”¹⁹⁷ This is a significantly different approach than the manifestations of the undemocratic impulse in tax policymaking, whereby the terms of the process are shaped explicitly to determine the course and the final destination.

Before turning to the specific question of what constitutes non-domination in tax policy making, what constitutes domination in general terms? In short, domination is “the illicit use of power that threatens people’s basic interests.”¹⁹⁸ Shapiro is consciously vague in defining domination more specifically—it is a matter of context, so he establishes five potential features of domination that can help identify whether it exists: (1) a person being “in the power of others,”

¹⁹⁵ See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. XI, 266 n.140 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasizing the importance of equality and majoritarian procedures among participants in decision making).

¹⁹⁶ See *supra* note 33, discussing variations of non-domination proposed by difference political philosophers focused on democracy; cf. WALZER, *supra* note 33, at 19 (“no citizen’s standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good.”).

¹⁹⁷ SHAPIRO, *supra* note 23, at 63.

¹⁹⁸ SHAPIRO, *supra* note 23, 172, 230 n.42; SHAPIRO, *supra* note 39, at 4 (emphasizing that domination requires the *illegitimate* use of power); see *supra* notes 177, 178 and accompanying text (discussing the concept of basic interests).

which happens when there is a loss of freedom resulting from human action; (2) the human action must be “alterable by those who are responsible for it”;¹⁹⁹ (3) there is a quicker trigger for domination—and greater concern for non-domination—where more important interests are at stake; (4) there is some illegitimacy in the exertion of power; and (5) “Domination is rooted in the particular,” that is: context matters.²⁰⁰ Domination does not require each and every of those five features to be present, but rather the presence or absence of these features, and the presence or absence of domination depends on the context of the social relationships at issue.²⁰¹

Consider an example. An employer has power over an employee, but in order to determine if there is domination in the relationship we must examine the particulars of the relationship and how the employer’s power is wielded. It may be legitimate for the employer to set the employee’s wages, select the employee’s work hours, and potentially fire the employee. But those same actions may be perpetrated illegitimately as well, if the employer pays an amount below what the employee deserves and needs, if the employer sets work hours arbitrarily and harmfully, or if the employer fires the employee without good cause. Whether those actions constitute domination that raise democratic justice concerns depends on the interests at stake for the employee—do wages from the job cover the employee’s basic needs, or is it a side job the provides extra cash for leisure? Thus there is a legitimate version of the employer exerting power over the employee, setting wages at a level that sustains the business and is appropriate compensation for the job performed and to cover the employee’s needs, and there is an illegitimate version, reducing wages such that the employee cannot afford basic necessities even in the face of excess profits to the employer facilitated by market conditions.²⁰²

Together these features create a working general definition of domination is: domination exists when other people have power over your access to the resources you need to survive, and wield that power in ways that are harmful to you.²⁰³ Domination is only possible where there is power to be wielded; lawmaking and policy making are centrally about how to exercise the government’s

¹⁹⁹ For example, a baby takes actions that result in loss of freedom to the baby’s parents, but the baby is not responsible for those actions. SHAPIRO, *supra* note 24.

²⁰⁰ SHAPIRO, *supra* note 24, at 21–24. In justifying his vagueness, Shapiro cites Ludwig von Wittgenstein’s questioning of universal concepts: the term “game” is a descriptive term for a family of things that do not share a single universal feature, but that each share some features with others in the category; domination is a similar sort of universal concept. *Id.* at 17 & n.8.

²⁰¹ *Id.* at 20.

²⁰² This example does not intend to confront here the multi-layered question of insufficient wages paid at market rates—arguably in that situation the employer does not have agency, although this route around a domination concern in the employer-employee context raises domination concerns in policy making that dictates market conditions, a possibility which suggests that a concept of non-domination could be important in policy making contexts beyond tax.

²⁰³ *Id.*; see also, Shapiro, *supra* note , at 294 (summarizing his focus with non-domination on “control [of] resources you need to vindicate your basic interests,” as “power-based resourcism”).

vast powers.²⁰⁴ Putting those two considerations together—domination as power, and power as government—yields that non-domination should be a key concern in how government operates and in the things it does.²⁰⁵ Tax policy should be a particular concern for non-domination, because it always implicates the distribution of resources in society and hence has the potential to implicate basic interests of anyone affected.

A concern for non-domination calls for two possible responses: (1) establishing mechanisms to prevent domination within a decision making process or (2) introducing mechanisms to allow the potentially dominated to escape. Consider again group A, Bezos and group C. If Bezos receives a debt-financed tax cut now, and group C might have to pay increased taxes in the future to repay that debt, and group C's financial situation is such that every dollar matters for each of their basic interests, then group C is at risk of domination in the current tax policy process. The only option to protect group C is to make sure that their interests are protected in some way in the current tax policy making process via some sort of safeguards. On the other hand, if group C were the beneficiary now, and Bezos might have to pay the bill either now or later, would Bezos' basic interests be threatened now and require protection? Although Bezos basic interests could be threatened, Bezos' wealth gives him—and few others—the opportunity to exit.²⁰⁶ For most taxpayers, the only potential way to avoid taxation is to change their behavior, and that is often not possible—an hourly worker can avoid income and payroll taxes by ceasing work, but would do so at the cost of her after tax income which may be necessary for her survival. Hence for most, like group C, domination in tax policy making must be controlled by mediating the policymaking process directly, not by counting on unsatisfied taxpayers to escape the enacted rules.

A final important element of promoting non-domination that is particularly applicable to tax policy is the treatment of winners and losers in any given round of decision making. In short, formal institutions of democratic governance should be designed to ensure “that the political contest remains open so that previous decisions are always open to challenge.”²⁰⁷ An iterative process recognizes the contingency of democratic decisions. As Michael Walzer eloquently summarized, “[i]n democratic politics, all destinations are temporary. No citizen can ever claim to

²⁰⁴ In non-government decision making contexts, an important aspect of Shapiro's theory of democratic justice is that democracy is a “subordinate” or “conditioning good” which should yield to any “superordinate goods” that are the object of the decision making. For example, in the employment context, a hierarchy and domination in decision making may be necessary to achieve the primary goal of producing a specific good or service for a consumer. SHAPIRO, *supra* note 23, at 47–48; SHAPIRO, *supra* note 24, at 33. However, in policy making and government action, there is no superordinate good—the entire decision-making process is about the exercise of power, and the issue of how to “manage power relations” is inescapable in governance. *Id.* at 33.

²⁰⁵ This non-domination concern has the potential to resonate across a variety of political commitments: stated at that high level of generality, it is a concern that can be shared by staunch libertarians and democratic socialists (or whatever constitutes the far-left end of the spectrum) and people in between.

²⁰⁶ A few thousand U.S. taxpayers who have obtained citizenship elsewhere expatriate each year, escaping the U.S.'s worldwide tax system. See Eva Farkas-Dinardo, *Expatriation and Compliance: How to Effectively Leave the U.S. Behind*, TAX NOTES: TAX NOTES TODAY (Oct. 4, 2019). But this exit option is essentially only available to people with significant financial resources.

²⁰⁷ JEFF JACKSON, EQUALITY BEYOND DEBATE: JOHN DEWEY'S PRAGMATIC IDEA OF DEMOCRACY 18 (2018); cf. GUTMANN & THOMPSON, *supra* note 25, at 6.

have persuaded his fellows once and for all.”²⁰⁸ If the goals of tax policy are ever-shifting—from funding the government, to accomplishing some version of distributive justice, to improving economic efficiency and growth, to fostering democratic citizenship—then democratic tax policy making should provide a forum for those (and potentially other) values and viewpoints to be expressed, heard, considered, balanced, and embraced or rejected or compromised, on an ongoing basis.

An iterative process has risks. If certain players are able to win some benefit in round *n*, and are able to use their round *n* win to gain advantage over others in round *n*+1 (even if domination in *n*+1 means gaining only a minor advantage), and then can further dominate in round *n*+2, and so on, then each successive victory becomes reinforcing, which is a formula for outright domination.²⁰⁹ On the other hand, if the process is designed so that a win in round *n* does not bear on round *n*+1, domination should be reduced even as there continue to be winners and losers in successive policymaking sessions. If domination accrues with each round of decisions, it follows that *less* policy making—i.e., adhering to the status quo—is preferable from a domination standpoint to *more* policy making. On the other hand, if each successive round might undo advantages won in the previous round, the more rounds are better from a domination standpoint.

Thus, an iterative process *with safeguards* can help to protect against domination. Shapiro describes the goal of “institutionalizing the opposition.”²¹⁰ This iterative approach is at odds with the sort of expert-theory prescribed theories of efficiency or distribution, in that those theories often preference the status quo and often recommend a specific predetermined outcome—if you see a correct and incorrect outcome, then it is illogical to empower those who advocated something incorrect.

IV. DEMOCRATIZING TAX POLICYMAKING PROCESSES

This Part applies the framework introduced in Part III to the institutions and practices that form the U.S. federal tax policymaking process, and proposes ways to use some of the tools that have constrained democratic forces in tax policy making instead to promote democratic legitimacy in tax policy making.²¹¹

A few preliminary points. First, in keeping with the spirit of democratic justice, the mechanisms considered here entail essentially incremental changes, with the idea of democratizing existing institutions and practices by “granting conditional legitimacy to inherited practices but

²⁰⁸ WALZER, *supra* note 33, at 310.

²⁰⁹ *Cf.* SHAPIRO, *supra* note 23, at 160–61 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT II, sec. 225 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)); WALZER, *supra* note 33.

²¹⁰ SHAPIRO, *supra* note 23, at 39.

²¹¹ *Cf.* K. Sabeel Rahman, *Policymaking As Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 362–64 (2018) (considering the potential of institutional design to “shape power dynamics” in policy making).

also subjecting them to critical scrutiny through the lens of democratic justice.”²¹² This is an application of *adaptive political theory*, meaning that it “start[s] from where we are, not from where we want to end up.”²¹³ Using the institutions and practices we have as a starting point has real world relevance, but also emphasizes taking advantage of existing institutional capacities to the extent they can be productively incorporated into democratically sound decision making. Shapiro describes this mode of democratic theory as working to move institutions, practices, and so on in the right direction, rather than working to fully prescribe the ideal world and all of its institutions and practices.²¹⁴ As mechanisms and reforms proposed in this Part are added to make the process more democratic in the ways suggested here, the policy outcomes will be increasingly democratically legitimate, and therefore are preferable to policies adopted through less democratic processes. That is, with each marginal improvement in democratic features of the process, the resultant policies are more legitimate than the predecessor policies.

Second, although the proposals that follow are focused on federal tax policy making, they may have relevance and utility in other substantive areas of lawmaking.²¹⁵ Beginning close to the inception of the modern income tax, federal tax policy making has been on the vanguard of Congressional lawmaking innovation more generally—tax prompted the introduction of congressional staff dedicated to statutory drafting, as well as non-partisan staff with subject matter expertise dedicated to policy analysis.²¹⁶

Section A explores some of the normative considerations implicated by the framework introduced in Part III. Section B proposes four reforms to improve inclusion and non-domination in federal tax policy making. Section C considers the substantive implications of these procedural reforms.

A. *Transparency, Accountability, Responsiveness*

The proposals in Section B are animated by three important public values—transparency, accountability and responsiveness. Each is elaborated below to set up the mechanisms that follow.

²¹² SHAPIRO, *supra* note 23, at 27.

²¹³ SHAPIRO, *supra* note 23, at 62. *See also* GUTMANN & THOMPSON, *supra* note 25, at 6; WALZER, *supra* note 33, at 310 (as discussed *supra* text accompanying note 208).

²¹⁴ SHAPIRO, *supra* note 24, at 16–17, 62. Shapiro emphasizes that democratic justice is concerned with “institutional redesign,” in which society should not reject and “design anew” the “ongoing complexes of institutions and practices” that have been developed to date, but rather should “democratize them as we reproduce them.” SHAPIRO, *supra* note 23, at 26. This approach is also consistent with the tradition of political realism described by Raymond Guess and embraced by Steve Sheffrin. *See* SHEFFRIN, *supra* note 22, at 53–54.

²¹⁵ Including state and local fiscal policy, discussed *supra* note 164, and also other types of policy at the federal level. There is general agreement that the particulars of democratic design “depend on context.” *See* GUTMANN & THOMPSON, *supra* note 25, at 6 (making that point with regard to deliberative principles).

²¹⁶ *See* Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014); *cf.* Susannah Camic Tahk, *Everything is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. LEGIS. 67, 82 (2013) (describing some of the more recent history of innovation in tax legislating in Congress); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 226–31 (2009) (describing the contemporary tax legislative process).

Start with transparency.²¹⁷ As Sheffrin observed, “For voice to be meaningful, there is a deep sense in which it must mean ‘informed voice.’”²¹⁸ Consider one aspect of transparency that targets the challenge of informed voice: reducing information costs to outsiders. Reducing information costs can help bolster informed voice for potential participants who would otherwise be outsiders, and it can help to address one particular form of domination that features centrally in tax policy making, what Wendy Wagner has deemed “information capture.”²¹⁹ In the context of agency rulemaking, she shows that sophisticated regulated interests are able to take advantage of the fact that they control much of the data relevant to the subject matter of a policy decision. By providing that data selectively in the regulatory process, and by providing it in ways that were inaccessible to potentially competing interests, these groups use it as a way to control the process to achieve their own desired outcomes.²²⁰ The same sort of phenomenon can exist in tax lawmaking, if well-resourced potential taxpayers control detailed information that may reveal how they will respond to different sorts of changes in law. Some of the proposals below promote transparency for the purpose of informed voice by requiring the decision-making body—e.g., a tax committee in Congress—to produce relevant data, and also to cull, synthesize and explain it in a way that levels the playing field as between interests with varied levels of sophistication.²²¹

Existing institutions for federal tax policy making are strong in promoting transparency in some respects and weak in others.²²² Consider who the decision makers are in tax policy, and how the tax policymaking process proceeds: to perhaps understate the obvious, both of these are somewhat muddled. Formally, there is an organized tax legislative process,²²³ and an organized

²¹⁷ See generally JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 10 (2018); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (identifying transparency guarantees as one of five fundamental freedoms).

²¹⁸ SHEFFRIN, *supra* note 22, at 219; *cf.* Kleiman, *supra* note 16 (citing Sheffrin and lamenting the lack of transparency that often characterizes local tax policy making).

²¹⁹ Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

²²⁰ *Id.* at 1326.

²²¹ This encapsulates the concept of data transparency so that decision makers and the public are able to draw from a common set of information that is as complete and thorough as possible, both during the decision-making process and afterwards so as to evaluate and understand it. See JEREMY BEARER-FRIEND, THE GREAT DEMOCRACY INITIATIVE, RESTORING DEMOCRACY THROUGH TAX POLICY (Dec. 2018), <https://greatdemocracyinitiative.org/wp-content/uploads/2018/12/Tax-and-Democracy-121118.pdf>; *cf.* Zelinsky, *supra* note 147, at 1173.

²²² See generally, Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 70 (Elizabeth Garrett et al. eds., 2008).

²²³ Tax laws are the jurisdiction of the House Ways and Means Committee and the Senate Committee on Finance, so all tax legislative proposals introduced by any member are referred to those committees. Each committee has publicly available rules that prescribe how the committee will consider and agree upon legislation, which in general terms proceeds through public hearings and public “mark ups” whereby the committee edits and agrees upon legislation that it then forwards to the full house for consideration. In the Senate, procedures control the extent of

hierarchy of decision makers.²²⁴ There are some tax-specific additions to the standard (formal) legislating process that could be understood as motivated by a desire to increase transparency, including the involvement of the JCT and the requirement that Congress rely on revenue estimates.²²⁵ In practice, however, the formal legislative process is often circumvented, and power centers have developed *other than* the ones prescribed in the rules, such that the actual people wielding influence are hard to discern.²²⁶ For example the Senate leadership (meaning party leaders, not committee chairs) has become increasingly important to tax policy making in recent years because tax changes are so often enacted under time pressure as part of omnibus end-of-year legislation.²²⁷ Further, although Congress has established some non-partisan sources of information,²²⁸ and built the tax policymaking process to make use of that information, those requirements are sometimes ignored, and some of those sources of information have come under partisan attack from members of the Republican party recently.²²⁹

If citizens can participate in democratic governance in one form or other to express their preferences, “a key characteristic of democracy is the continued responsiveness of the government” to those preferences.²³⁰ When adequate transparency allows affected interests to know and understand what policy has been enacted and why, it facilitates accountability and, in

debate and allow for amendments once a legislative proposal from a committee is brought up for consideration; in the House, special rules are adopted to control debate and (generally) limit amendments for each piece of legislation. In the formal version, each house passes legislation (the House originating tax legislation), and then differences are reconciled by a conference committee made up of members of each house. *See* COMM. ON FIN. RULES, *supra* note 109.

²²⁴ The chairs of the two tax committees have special power over tax rules because the chairs set the agenda. Members of those committees have special authority over tax legislation as compared to other members of Congress, and in particular the chairs of subcommittees have some formal power to set the larger committees’ agendas. When the House Ways and Means Committee reports legislation to the full house, it is subject to consideration under rules established by the House Rules Committee, which is controlled by the Speaker of the House. In the Senate, the floor agenda is controlled by the Senate Majority Leader, although that person has traditionally had less power to dictate how legislation is considered as compared to the House.

²²⁵ *See, e.g.*, notes 95-98 and accompanying text.

²²⁶ Often the Speaker of the House and/or the Senate Majority leader use their control of the floor agenda to shape the substance of legislation before it comes to the floor. For example, the recently enacted CARES Act was passed under immense time pressure and essentially bypassed the relevant committees. *See* Wallace, *supra* note 35.

²²⁷ *See, e.g.*, N.Y. TIMES, *The McConnell-Biden Plan* (Jan. 1, 2013), <https://archive.nytimes.com/www.nytimes.com/interactive/2013/01/01/us/the-mcconnell-biden-plan.html> (detailing a legislative compromise negotiated during a lame-duck Congress by Republican Senate minority leader Mitch McConnell); Jennifer Steinhauere, *Divided House Passes Tax Deal in End to Latest Fiscal Standoff*, N.Y. TIMES (Jan. 1, 2013), <https://www.nytimes.com/2013/01/02/us/politics/house-takes-on-fiscal-cliff.html>.

²²⁸ Namely the JCT staff and CBO. *See supra* notes 115-118 and accompanying text.

²²⁹ For example, when the JCT released its cost estimate for the 2017 Tax Legislation, several Republican Senators flatly stated that they did not believe that the JCT’s deficit estimate was correct. *See generally* Jacob S. Hacker & Paul Pierson, *The Paradox of Voting—for Republicans: Economic Inequality, Political Organization, and the American Voter*, in REPRESENTATION: ELECTIONS AND BEYOND 140 (Jack H. Nagel & Rogers M. Smith eds., 2013); *see also* IAN SHAPIRO & MICHAEL J. GRAETZ, DEATH BY A THOUSAND CUTS (2005) (arguing that these mechanisms have worked to reduce voter interest and manipulate of social values).

²³⁰ ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971).

turn, government responsiveness.²³¹ Thus, particularly in a representative system, transparency is a prerequisite for establishing means of recourse so that citizens can “sanction” unrepresentative actions.²³² As numerous critics have observed, the requirements surrounding the notice and comment process for regulations under the Administrative Procedure Act are designed to ensure transparency, but the result is a “passive” and incomplete attempt at democratic legitimation.²³³ Passivity can be inadequate: accountability and responsiveness are values that demand more than passivity as to whether the actions of the government align with the preferences expressed by citizens.²³⁴

Responsiveness can be complicated. A government may have mechanisms in place to be responsive, but if the participants to whom the government responds are skewed in some relevant respect, then the government’s actions will not be responsive to community preferences.²³⁵ And even if participation reflects the appropriate affected interests, there arises a related question: “to whose interests should the government be responsive when the people are in disagreement and have divergent preferences?”²³⁶ Representatives in a representative democracy “must be able to act when public preferences are confused or split, when citizens are apathetic or ignorant, and even when the public is outright opposed to what the government must do.”²³⁷ To overcome these challenges, representatives must have *some* degree of autonomy as decisionmakers, or else they will simply reflect the paralysis of the public at large.²³⁸ There are many challenges in promoting democratic decision making. But there is also significant opportunity to effectively improve on the status quo.

²³¹ John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131 (Adam Przeworski et al. eds., 1999) [hereinafter DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION] (government responsiveness depends, in part, on “how much accountability an institutional structure permits.”); *see also* Kleiman, *supra* note 16, at [19] (quoting Ferejohn, *supra*).

²³² *See generally* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 231, at 4.

²³³ K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 24 (2017); Wallace, *supra* note 49 (describing general public inattention to tax rules proposed via the notice and comment process, perhaps attributable to the inscrutability of tax rules to the non-expert public).

²³⁴ DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 231, at 4 (quoting ROBERT A. DAHL, AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY (1970)).

²³⁵ *Id.* at 11.

²³⁶ LIJPHART, *supra* note 138, at 2.

²³⁷ STEINMO, *supra* note 39, at 8. Steinmo notes that taxation fits squarely in the latter category: the public is often opposed to taxation. *Id.*

²³⁸ A similar concern arises from strong preferences: Shapiro and others argue that democracy should “not generally take intensity of preference into account,” and to the extent that some person or group’s strong preference skews democratic results for others who (appropriately) treat democracy as a subordinate good, that expression of preferences should be constrained. SHAPIRO, *supra* note 23, at 250 n.13.

B. Mechanisms for Democratizing Tax Policy Making

The following proposals focus on how the existing tax policymaking process might be reformed to move towards an appropriately inclusive and non-dominated tax policymaking process in the U.S. Congress. The suggestions could be imposed by acts of Congress either as legislation or adopting new rules, procedures, or practices that promote transparency, responsiveness and accountability.²³⁹ The specifics of these proposals are crafted to fit the federal tax policy making process in Congress, but the mechanisms and proposed outputs of the decision making process can fit into other contexts as well.

1. Analysis of Actual or Example Taxpayers

Congress should require its own expert staff to prepare analysis of the effects of proposed tax changes on specific taxpayers, including individuals with different family situations and at various income levels, and covering different geographies. This could be done by creating hypothetical taxpayers or by reference to actual taxpayers.²⁴⁰ The analysis could be made most useful by being very specific and politically relevant, including by covering different typical taxpaying units in each state and each congressional district. For example, the analysis could estimate changes in tax liability for a family of four (and other typical family types) based with the median income in the congressional district, and integrating state and local tax liability and other characteristics specific to that district. This would be far more illuminating than existing analysis, even including distributional tables indicating the amount of tax benefit or percentage changes by income band (e.g., taxpayers with income less than \$10,000 will have tax liability of \$x less this year as compared to their anticipated liability under current law).²⁴¹

Taxpayer specific analysis would promote both inclusion and non-domination. On inclusion, reliable analysis of effects would provide a simple way for voters to provide input to their representatives and to hold their representatives accountable. This could be done by lobbying the

²³⁹ Cf. Kleiman, *supra* note 16 (introducing a concept of “public control” in local fiscal decision making, which is defined to include “government responsiveness, public participation, and fiscal accountability”); Richard M. Bird & Eric M. Zolt, *Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1648–49 (2005) (discussing the importance of transparency, participation and accountability in adopting decentralized tax structures in developing nations transitioning to democracy).

²⁴⁰ Michael Graetz previously suggested the possibility of analysis along these lines of some hypothetical taxpayers. See Graetz, *supra* note 156, at 680–81 (suggesting that Congress should dispense with distributional tables and instead rely on “staff-produced examples of how legislation under consideration would affect the taxes of specific examples of typical families.”). Graetz made this suggestion as a response to his critique of the budget process as inducing Congress towards relying on gimmickry to achieve budgetary and distributional results that formally met certain benchmarks. Rather than allow policy to be controlled by those benchmarks, which he argued are arbitrary (a critique that is consistent with the undemocratic impulse explored in Part II of this paper), he proposed more granular and relevant data points. *Id.*

²⁴¹ See, e.g., JOINT COMM. ON TAXATION, JCX-10-19, DISTRIBUTIONAL EFFECTS OF PUBLIC LAW 115-97 (Mar. 27, 2019), <https://www.jct.gov/publications.html?func=startdown&id=5173> (providing standard distributional analysis of the 2017 Tax Act); see Graetz, *supra* note 237.

representatives’ offices directly and, later, by holding them to account in elections. As for non-domination, information about effects of legislation provided in relatable terms would make it harder for representatives to support narrow interests at the expense of their own constituents. Further, the analysis could reveal whose basic interests might be threatened or bolstered and to what extent.

The use of example taxpayers already plays an informal role in tax policy debates at the federal level. During consideration of the Tax Cuts and Jobs Act, various third party groups released analysis of hypothetical taxpayers and how those taxpayers would fare under different versions of the proposed legislation.²⁴² Although these estimates were often non-partisan, the groups behind them often had specific normative and political commitments that were relevant to the kind of data they might be interested in providing. Further, the assumptions built into their calculations were not always disclosed or clear. An officially sanctioned version of example taxpayers could include mechanisms for transparency and consistency between different sample taxpayers and across different pieces of legislation over time. This sort of information could help taxpayers as voters and as constituents able to engage with their representatives to base their opinions on common and consistent information, and develop a better understanding of what their representatives supported or opposed.²⁴³

To be most useful for engaging participants in the policymaking process and facilitating accountability and responsiveness, such analysis could be produced for each Congressional district, so that voters could directly connect a proposed change in law to their own circumstances. Although preparing analysis of example taxpayers in 535 different jurisdictions would be a burdensome task, it is certainly one that is possible with existing data.²⁴⁴ This analysis should also reflect additional distilling of tax and other data to specify “the ways in which the tax laws have disparate impacts along the lines of race, ethnicity, socioeconomic class, gender and gender

²⁴² For example, the Tax Foundation analyzed the law, created hypothetical taxpayers with different attributes, and estimated their change in tax liability. Amir El-Sibaie, *Who Gets a Tax Cut Under the Tax Cuts and Jobs Act?*, TAX FOUND. (Dec. 19, 2017), <https://taxfoundation.org/final-tax-cuts-and-jobs-act-taxpayer-impacts/>. The Tax Policy Center constructed a “calculator” to allow taxpayers to estimate the effect of the changes on their own returns, and included various scenarios (e.g., married with one child age 17, one child in college). *Tax Cuts and Jobs Act Calculator*, TAX POL’Y CTR., <http://tpc-tax-calculator.urban.org/> (last visited Feb. 24, 2020); *see also* TAX FOUND., *supra* note 2.

²⁴³ *Cf.* EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* (2019) (proposing various reforms, and providing an internet-based “tax simulator” tool, <https://taxjusticenow.org/>, to allow people to estimate tax burdens of different alternative tax plans).

²⁴⁴ Specifically, the JCT currently bases its distributional tables and revenue estimates on a data base of more than 300,000 actual individual income tax returns. *See* JOINT COMM. ON TAXATION, *REVENUE ESTIMATING PROCESS* (Jan. 2017), <https://www.jct.gov/publications.html?func=startdown&id=4969>.

identity/expression, sexual orientation, immigration status and disability” as well as geographic location, across different industries, and so on.²⁴⁵

The more specific and detailed the example taxpayer analysis can be, the better for political accountability. The JCT could analyze a variety of different types of taxpayers—single filers, joint filers, families of varying sizes, young people, old people, and so on. The analysis should reflect differences across states or even within states. For example, a tax law might affect a family of four living in New York City differently than a family of four living in upstate New York, and differently than a similar family living in South Carolina. It could provide analysis of a family at the median income in each jurisdiction, and at the median national income for both. It could be further specified to account for relevant differences in state laws, for example anticipating the deduction for state income tax rates in each jurisdiction. To the extent feasible, this analysis should also be integrated with broader analysis of the distributional effects of spending programs.²⁴⁶

A further step towards transparency and accountability would be to analyze *actual* taxpayers. This would mean the JCT staff would use real tax return data to find illustrative taxpayers. Already, the models JCT uses are based on actual taxpayer data, although personal information is removed by the IRS.²⁴⁷ Actual taxpayers’ identifying information could be removed from the analysis to protect taxpayer privacy and comply with current privacy protections, but it would still be useful to inform the public in a potentially more meaningful way than hypothetical people. Alternatively, Congress could establish a procedure to request that individuals waive their privacy rights to a limited extent to allow JCT staff to actually meet with them and discuss impacts of potential tax changes in non-technical terms, for example by reference to the taxpayer’s budget and spending priorities or other potential effects.

2. *Sponsorship, Support and Reason-Giving*

Another additional transparency requirement is to make clear *who* is responsible for specific provisions of tax bills and *why*. There are two potential elements. First, the name of the sponsor of each particular provision should be attached to that provision. Second, the individual members who support or oppose each provision should be recorded.

The idea, as with the first proposal above, is that transparency will facilitate non-domination. There are numerous stories of mysterious, narrowly targeted tax provisions appearing in legislation without any external or public clues as to who is responsible.²⁴⁸ Increasing transparency would

²⁴⁵ ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 13 (2018); cf. Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. __ (forthcoming 2020).

²⁴⁶ See, e.g., EDWARD KLEINBARD, WE ARE BETTER THAN THIS 360-63 (building on a 2013 CBO analysis to estimate the combined distribution of federal tax and spending programs); CONGRESSIONAL BUDGET OFFICE, THE DISTRIBUTION OF FEDERAL SPENDING AND TAXES IN 2006 (Nov. 7, 2013), <https://www.cbo.gov/publication/44698>.

²⁴⁷ *Id.*

²⁴⁸ Wallace, *supra* note 35, at *10 n.29 (describing how a special tax break was added by the Chair of the Senate Finance Committee into a recent piece of legislation that was passed on an emergency basis, which a reporter determined by speaking with staff in not-for-attribution interviews).

move such maneuvers into the public eye, requiring would-be dominant interests to find representatives who are willing to be held publicly accountable for their support.

Currently, in order to facilitate deliberative and informed tax policy making, the JCT staff provides members of Congress with summaries and revenue estimates of proposals on a confidential basis—the JCT does not publicize the request, nor the substance of the proposal, nor the results of the JCT staff’s work.²⁴⁹ The disclosure rule contemplated here would require that each distinct provision included in a bill for consideration by the full committee must have attached to it the name of at least one representative who is the primary sponsor. If no one will take responsibility for it, it cannot be included in the bill. Similarly, a rule could require disclosure of the supporters of each distinct provision. A rule that also required each provision to have a majority of the committee as supporters would hamper logrolling, which may not be desirable; a rule that simply requires disclosure without assuring a majority for each distinct provision would potentially encourage a version of trading disclosed sponsorships (e.g., representative A sponsors bad looking provision X, while representative B sponsors bad-looking provision Y, while each representative supports both bad-looking provisions).

Still, this degree of transparency would allow for more accountability than the status quo. Currently, the “chairman’s mark,” i.e. the draft of the legislation that is the starting point for the committee markup, does not include specific attribution of particular elements. Sometimes it is possible to track down what specific representative is responsible for a specific provision, but not due to any formal mechanism.²⁵⁰ In the (existing) idealized version of a committee markup, there exists a version of this sort of disclosure in that each proposed amendment offered during a markup is offered by an individual representative and subject to a vote by the committee members.²⁵¹ But in reality, those votes often do not occur, and even if they do, they are often not recorded. As a result, it is often mostly unclear where any particular idea originated or who precisely supports it, particularly with end-of-session grab-bag legislation.²⁵²

The record contemplated here could become part of the committee report that must be transmitted for the bill to be considered in by the full legislative body. This sort of rule would require additional mechanisms to prevent legislators from circumventing disclosure by, for example, agreeing to withhold amendments until after committee consideration, as discussed in proposal four below.

²⁴⁹ Wallace, *supra* note 48, at 198 n.87.

²⁵⁰ See *supra* note 248.

²⁵¹ Wallace, *supra* note 48, at 200 n.97 (describing the markup process).

²⁵² See, e.g., Jad Chamseddine, ‘Annual Circus’: Tax Extender Juggling Likely to Continue, TAX NOTES: TAX NOTES TODAY (Dec. 19, 2019) (describing 30 temporary tax credits and other tax provisions thrown together for passage in an end-of-year bill, which has become a nearly annual tradition in Congress).

Beyond requiring disclosure of *who* is supporting any particular tax provision, rules or framework legislation could also be used to require disclosure of *why* each provision is being advanced.²⁵³ In general, Congress is free to pursue legitimate state purposes (including, for example, raising revenue) without explaining their reasoning, and even to act based on purely political considerations.²⁵⁴ A reason-giving requirement as part of the legislative process would demand that each representative participating in the legislating process produce or sign on to statements explaining their justification for supporting distinct provisions, that could also serve to explain in very simple language what the provision is intended to accomplish.²⁵⁵ This would be a refinement of current practice, whereby the JCT prepares summaries of provisions to be considered by each committee.²⁵⁶ Although these explanations are more scrutable than the actual text of the legislation or the tax code, they are nonetheless often difficult to penetrate for non-experts.²⁵⁷ The JCT's explanations of tax provisions, described in proposal four below, provide a version of this, but they are often written in a narrowly descriptive manner—those explanations do not venture to describe what the effects of the law change will be in the real world, nor what is the intended purpose.²⁵⁸

²⁵³ Cf. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 848 (2014) (endorsing “transparency of reasons and purposes” as an antidote to gridlock in federal lawmaking); MASHAW, *supra* note 217, at 10–12.

²⁵⁴ See *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 670–72 (1981) (validating a tax scheme because the legislature “rationally could have believed” that the tax would serve the state’s legitimate purpose, even though such rationalization was not provided by the legislature); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (“States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.”).

²⁵⁵ Often individual representatives provide statements explaining their voting positions, but there is no mechanisms for prompting those statements to address particular provisions of the laws on which they are voting. At least one member of Congress has sought to provide transparency along the lines described here. See, Rachel Bade, *Amash Explains Votes on Facebook*, ROLL CALL (May 10, 2011), (detailing some of Rep. Amash’s explanations of specific votes on facebook, for example “I voted ‘present’ on Amendment 11 to HR 1, because while I oppose abortion funding, the language, as drafted, violates my conservative approach to legislating. Legislation that names a specific private organization to defund (rather than all organizations that engage in a particular activity) is improper and arguably unconstitutional.”).

²⁵⁶ Wallace, *supra* note 48, at 199–201.

²⁵⁷ There are norms in the federal legislative process that operate to this end, most notably the involvement of the JCT and the CBO in the development of tax legislation. These norms regarding how those explanations are meant to be considered in the legislative process were degraded in the rush to enact the 2017 Tax Act. For example, the JCT-prepared explanation of a key provision of new § 199A enacted as part of the 2017 Tax Act defines the types of businesses that will be excluded from the benefit but does so in almost the exact same language as is provided in the statute cross referenced by the § 199A – that is, the explanation has no explanatory value in that it adds nothing of substance to the content of the law. H.R. REP. NO. 115-466, at 39 (2017) (Conf. Rep.). This kind of explanation is not atypical, although sometimes the JCT prepares more robust explanations, at least of certain provisions. The hurried nature of the enactment of the 2017 Tax Act—it went from proposed to enacted in four months, as compared to more than two years for the previous tax reform effort—exacerbated the problem of inadequate transparency in this respect.

²⁵⁸ Wallace, *supra* note 35, at *10 (comparing a basic description in the recently enacted CARES Act with another provision for which no description was provided).

A plain language statement would explain more directly what a proposal entails and its qualitative effect and/or directional effect (e.g., will increase x) on certain taxpayers. These explanations could be required for provisions that will affect individuals who may not have tax law training, in contrast with provisions that are targeted towards lawyers and accountants who represent sophisticated taxpayers. The statements would be constrained by the example taxpayer analysis in the first proposal above. Again, the purpose of this sort of disclosure would be to reduce domination by discouraging representatives from acting in non-publicly interested ways. And it could engage would-be nonparticipants to understand how their interests were implicated, allowing them to take it into consideration at election time. Further, the fact of disclosure would likely change how some representatives act.

Requiring that sponsors of a provision provide a justification for the provision is particularly valuable in the tax policy context because the judicial review mechanism, which in some other contexts might cause members of Congress to rationalize their intent and purposes, has relatively little bearing on the federal tax system. This is the case for a few reasons. First, standing doctrine makes it essentially impossible for taxpayers who are not personally disputing their own tax liability to challenge tax laws in court.²⁵⁹ Second, the Tax Anti-Injunction Act further restricts access to the courts because it prevents even actual taxpayers from challenging tax laws until they have remitted tax payments, *i.e.*, it prevents courts from imposing injunctions to prevent the enforcement of tax laws, and even prevents cases considering the validity of tax laws on Constitutional or other grounds until a taxpayer has been assessed and paid tax liability.²⁶⁰ Third, tax laws generally are not subject to any degree of heightened scrutiny,²⁶¹ and federal courts' reviews of tax laws show that rationality review²⁶² is not an effective tool for ensuring that tax policy is, in fact, rational.²⁶³ All of this means that the systemic effects of tax policies are rarely subject to judicial review.

Nonetheless, the tax system may lose legitimacy when it is irrational or inconsistent, in particular when the cause appears to be a policymaking process that excluded some people or that

²⁵⁹ Sugin, *supra* note 40, at 651 (detailing the limits of standing doctrine as applied to challenges to tax laws).

²⁶⁰ 26 U.S.C. § 7421.

²⁶¹ *Cf. McCray v. United States*, 195 U.S. 27, 55–59 (1904) (emphasizing that Congress need not explain itself when exercising its constitutional taxing power, and courts should not query underlying justifications and purposes in the application of that power).

²⁶² That is, that any rational basis that the legislature “may have” contemplated is sufficient to sustain a law against constitutional challenge. *See generally* *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955); Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 430 (2004).

²⁶³ *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (the Court applied a version of rationality review, notwithstanding that both the dissent and the majority recognized the state tax scheme at issue to be extremely unfair and discriminatory).

was skewed in favor of certain participants.²⁶⁴ Reason-giving at the time a tax law is enacted—and to have Congress require that of itself, will protect this aspect of legitimacy.²⁶⁵ Rather than accepting the sort of special arrangements that have come to typify the federal tax code, a framework for inclusive and non-dominated tax legislating should include a preference for carefully reasoned legislative proposals.

3. *Engaging Unlikely Participants*

The committee process during which legislation is drafted and amendments are considered should require specific outreach to inform people affected by the legislation who may not be aware that they are affected and who are not well-positioned to monitor the process.²⁶⁶ The precise design of these publicity and input mechanisms could draw from recent efforts to improve public engagement in the administrative process.²⁶⁷ One possibility is to host information sessions that take place in affected communities that are not typically engaged in the tax policymaking process. The congressional tax committees have tried versions of this earlier in the tax policymaking process in the past, traveling to hold hearings on potential tax reform proposals.²⁶⁸

Relatedly, outreach to affected communities requires that tax bills be subject to extended public scrutiny prior to a vote on enactment. This alone would mark an improvement in the transparency of the tax legislative process. As discussed, some commentators objected to the Affordable Care Act and the Tax Cuts and Jobs Act on grounds that the to-be-enacted legislation was not revealed publicly with enough time for the effects and consequences to receive public scrutiny before Congress voted.²⁶⁹ Similar objections were lobbed towards tax legislation towards the end of 2010 (extending the Bush tax cuts temporarily),²⁷⁰ and 2012 (lame-duck Congress extended some Bush tax cuts permanently and repealed others to end a government shutdown and avert the so-called fiscal cliff).²⁷¹ In contrast, the process that led to the enactment of the 1986 Tax Reform Act extended over a period of years, and included many opportunities for public scrutiny of various

²⁶⁴ *Id.*

²⁶⁵ *Cf.* MASHAW, *supra* note 217, at 4–8 (discussing the legitimacy of administrative decision making as compared to legislative and judicial decision making, and the concept of “rational democracy” introduced in American Progressive movement).

²⁶⁶ A similar requirement could also be potentially be imposed as part of in the floor process when further amendments may be considered.

²⁶⁷ *See* MICHAEL SANT’AMBROGIO & GLEN STASZEWSKI, ADMIN. CONFERENCE OF THE UNITED STATES, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING (Nov. 19, 2018).

²⁶⁸ Press Release, Baucus, Camp Talk Tax Reform in Visit to the Twin Cities (Jul. 8, 2013), <https://www.finance.senate.gov/chairmans-news/baucus-camp-talk-tax-reform-in-visit-to-the-twin-cities> (describing the Chairmen of the Senate Finance Committee and the House Ways and Means Committee as planning to “visit communities across the nation . . . to hear directly from the American people . . .”).

²⁶⁹ *See supra* note 6 and accompanying text.

²⁷⁰ *See* Brian Montopoli, *Obama Signs Bill to Extend Bush Tax Cuts*, CBS NEWS (Dec. 17, 2010), <https://www.cbsnews.com/news/obama-signs-bill-to-extend-bush-tax-cuts/>.

²⁷¹ *See supra* note 227.

proposals.²⁷² There are obvious transparency considerations in making legislation public before it is enacted, and there are also potential substantive benefits in the form of allowing for feedback from the public and providing the opportunity to facilitate such feedback.

Framework legislation seeking to improve inclusion and limit domination could require that legislative proposals be released to the public for a certain amount of time before advancing in the legislative process. Versions of rules requiring time for public examination exist already in congressional rules, although they are sometimes sidestepped.²⁷³

A further step beyond informing the public about potential tax policy changes is to elicit feedback from sources that do not usually participate in tax policy making, and create mechanisms for that feedback to be provided at relevant junctures in the process and in forms that are useful for designing legislation. Some potentially useful mechanisms have been proposed and tested in the administrative rulemaking process.²⁷⁴ Possibilities including running representative focus groups to react to proposals, scheduling hearings, meetings and “listening sessions” soliciting participation from members of those communities, establishing advisory committees to provide community input on an ongoing basis, and using the Internet to elicit feedback.

These sorts of outreach efforts may seem counterintuitive in Congress in that the members are supposed to represent their constituents. Indeed, some of these methods are not new to Congress, although they have been implemented on an ad hoc basis. The 1954 Tax Reform Act was the product of particularly extensive public hearings and debates, for example, including field hearings with testimony from non-experts.²⁷⁵ More recently, Representative Camp and Senator Baucus traveled around the country on a “Tax Reform Tour” in 2013 in an effort to elicit input to shape their tax reform proposals.²⁷⁶ Expanding on these sorts of efforts by using tax data, example taxpayers and publicly-accessible examples (as contemplated in the first proposal) to establish these sorts of mechanisms would allow members of Congress to really understand how they are affected, which is hard for them to do otherwise due to lack of information or lack of staff resources. In practice many Congressional offices often work to engage with their constituents, but they too do so on an ad hoc basis. Formalizing methods for engaging individuals specifically

²⁷² See Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 457 n.2 (2018) (summarizing the extended process for enacting the Tax Reform Act of 1986, in contrast to the Tax Cuts and Jobs Act).

²⁷³ The Senate generally permits unlimited debate, and even the formal rules to limit debate (Rule XXII, known as cloture), allows for one hour of time to speak on the floor for each Senator before the final vote. See Walter J. Oleszek, CONGRESSIONAL RESEARCH SERVICE, *Cloture: Its Effect on Senate Proceedings* (May 19, 2008), <https://www.senate.gov/CRSpubs/271e65d0-6862-4e62-938c-8e65249ae391.pdf>.

²⁷⁴ SANT’AMBROGIO & STASZEWSKI, *supra* note 267.

²⁷⁵ See Stanley S. Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957).

²⁷⁶ E.g., *supra* note 268.

with regard to tax policy would help members of Congress accomplish something that many are already trying to do, and would promote broader inclusion in a way that does not further the domination of particular interests. This sort of engagement can prevent the capture that is possible when “social interests are under-represented and overlooked in the policymaking process.”²⁷⁷

4. *Requiring Action on a Regular Basis*

Simply conceiving of mechanisms to increase transparency and participation and accountability is not enough to ensure these features actually happen in the tax policymaking process. Congress must force itself to act in the right way, which requires both carrots and sticks. Elements of the Budget Act are instructive,²⁷⁸ Indeed, one of the successes of the Budget Act is that Congress does, indeed, generally enact budget reconciliation legislation each year.²⁷⁹

In that Budget Act mold, the features contemplated above should be required in order for Congress to proceed through debate in a privileged manner. That is, if Congress falls within certain requirements for inclusion and non-domination, that should unlock preferable procedures. For example, if the House Ways and Means committee produces legislation (i) that is accompanied by analysis of example taxpayers (meaning that the JCT has been given sufficient time to run analysis of the legislation for that purpose), (ii) for whom the sponsors of each provision and supporters of that provision are disclosed, and for which the sponsors of each provision have provided a statement in their own name explaining what the measure does and what effect they expect it will have in the real world based on data from JCT, and (iii) the Committee’s preparation included field hearings and focus groups to solicit input from underrepresented constituencies, then that would qualify the legislation for consideration by the full House of Representatives under a special predetermined rule. The rule might, for example, require debate and a roll call vote on the floor without further amendment before any other spending or revenue measures could be considered. Because these other bills are necessary with some frequency, House leaders would be incentivized to move quickly on the qualifying legislation. Because the special rule for consideration is predetermined, there would not be an opportunity to derail the legislation as conceived by the Ways and Means Committee (for example, the bill could not be replaced with a substitute).²⁸⁰

²⁷⁷ K. Sabeel Rahman, *Conceptualizing the Economic Role of the State: Laissez-Faire, Technocracy, and the Democratic Alternative*, 43 *POLITY* 264, 284 (Apr. 2011). Nonetheless, requiring these sorts of mechanisms to elicit feedback from people who are generally disengaged from tax policy making would help to satisfy the principle of affected interests in practice, and help to counteract domination by voices that are able to insert themselves into the process independently by making sure they cannot be totally ignored, especially early in the policy development process.

²⁷⁸ See *supra* notes 95-102 (describing the Budget Act).

²⁷⁹ See Heniff, *supra* note 98 (tallying 24 reconciliation bills from 1980 to 2016; Congress has relied on reconciliation twice more since then); *but see* Kysar, *supra* note 101 (arguing that Congress’ failure to effectively enforce its own budget rules—including constraints introduced in the budget process and through PAYGO rules—against itself has negative substantive repercussions for tax policy).

²⁸⁰ Note: the rules for consideration would need to be fully specified in various ways to prevent the purpose described here from being subverted.

A similar approach could be accomplished in the Senate: if a qualifying bill were passed out of the Senate Finance Committee, the Senate could be required to consider the legislation on the floor with limited time for debate and limited opportunities for amendment, similar to the Budget Act requirements. Again, the purpose would be to ensure that the democratic features of the legislation-writing process were used; once that is accomplished, the goal is to get the legislation the necessary vote for approval or disapproval by the full chamber.

A stronger version of this sort of democracy-enhancing framework legislation could block other types of legislation in each new session of Congress *until* the relevant committee in either chamber produces a bill that fits these guidelines. In that case, before the Senate could consider any other legislation from the Finance Committee, it would have to consider a bill meeting these specified requirements.²⁸¹

Because tax legislation is a perennial focus of Congress, some version of this kind of requirement could be effective. Indeed, a perennial problem for the tax writing committees has been that their most thorough work is left dormant by the larger bodies: in recent years significant careful work at the committee level has never made it to the floors of the House or Senate. Examples include numerous pieces of “technical correction” legislation, and more substantial reform legislation put forward by the Ways and Means Committee under former chair Dave Camp (sometimes referred to as the Camp plan) in 2014,²⁸² and by the Senate Finance Committee in late 2013.²⁸³ These bills are on the more democratically legitimate end of the spectrum in that they have been the product of public debates and compromise, rather than last minute, behind-closed-doors arrangements that have typified significant tax legislation recently.

Other variations are possible as well, but the core idea is consistent: turn some of the tools of framework legislation on their head to promote democratic debate and engagement, with the ultimate goal of promoting democratic legitimacy, rather than attempting to avoid and constrain democratic forces.

²⁸¹ A loophole, of course, is that the Senate can always consider legislation by unanimous consent, but that allows that framework legislation that strongly favors the sort of democratic legitimacy features discussed here would not actually prevent other Senate action in case of an emergency. It would simply make this particular type of action more favored procedurally.

²⁸² See JAMES R. NUNNS ET AL., URBAN-BROOKINGS TAX POL’Y CTR., DESCRIPTION AND ANALYSIS OF THE CAMP TAX REFORM PLAN (July 8, 2014), <https://www.taxpolicycenter.org/publications/description-and-analysis-camp-tax-reform-plan>.

²⁸³ See Press Release, U.S. Senate Comm. on Fin., Baucus Unveils Proposals for International Tax Reform (Nov. 19, 2013), <https://www.finance.senate.gov/chairmans-news/baucus-unveils-proposals-for-international-tax-reform>; see *supra* notes 268, 276 and accompanying text.

C. *What to Expect from Democratic Tax Policy Making?*

The mechanisms suggested above could work to foster a more inclusive tax policymaking process, and one that is incrementally less dominated by specific interest groups. What would these reforms mean for the substance of tax policy? Although these structures are agnostic as to outcomes, there is a significant body of empirical work that suggests the *kinds of* effects that broader engagement in tax policy making might have on substantive tax policy. Inclusivity may foster faith in government, and even short of that may prevent faith in government from otherwise being undermined due to substantive tax policy.²⁸⁴ It is also unclear how a more inclusive policymaking process might shift outcomes at a more general level. The difference between expert and non-expert evaluations of tax fairness would seem to suggest that tax policy outcomes would be *different* if greater voice is given to a broader swath of the population.²⁸⁵ On the other hand, it may mean that tax policy outcomes remain similar to current policies, but the process improvements result in greater perceived justice and citizen satisfaction.²⁸⁶

Vanessa Williamson and others have found that when tax policy preferences are more informed, those preferences tend to align more closely with individual economic interests in a relatively progressive way than does current policy.²⁸⁷ Further, in broad terms at least, there are major areas of agreement as to appropriate tax and transfer policies, suggesting that better systems for promoting inclusion and non-domination could lead to enactment of some policies that are agreeable to a broad swath of the democratic community.²⁸⁸ Yair Listokin and David M. Schizer have shown that taxpayer support for paying taxes to fund government spending that they like is conditioned in part on feeling more engaged in the decision-making process and understanding

²⁸⁴ Cf. WILLIAMSON, *supra* note 40; ZELENAK, *supra* note 40, at 17. To this end, the opportunity to participate in fiscal policy making might help to bridge the gap for citizens who are unable to engage directly as fiscal citizens by filing tax returns or taking advantage of empowering tax benefits, because they do not have U.S. federal income tax liability. See Staudt, *supra* note 40, at 939 n.51.

²⁸⁵ SHEFFRIN, *supra* note 22, at 1. Sheffrin observes that tax policy implicates the work of “[p]hilosophers, economists, psychologists, lawyers, and tax theorists,” and, in parallel, also ignites passions in “the general public.” *Id.* As noted, he found that the public’s views of fairness in taxation “are often quite distinct from those held by tax policy theorists.” *Id.*

²⁸⁶ See *supra* notes 22 & 158, describing Sheffrin’s findings on the importance of process and procedure for non-experts evaluating the fairness of the tax system.

²⁸⁷ E.g., WILLIAMSON, *supra* note 40; 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).

²⁸⁸ CARROLL DOHERTY ET AL., PEW RESEARCH CTR., *GROWING PARTISAN DIVIDE OVER FAIRNESS IN NATION’S TAX SYSTEM* (Apr. 4, 2019), <https://www.people-press.org/2019/04/04/growing-partisan-divide-over-fairness-of-the-nations-tax-system/> (showing that although there were sharp partisan divides on impressions about the 2017 Tax Act specifically, respondents found agreement when asked about the extent to which it bothers them that corporations or “wealthy people” may not “pay their fair share”: more than 80% of respondents were bothered “a lot” or “some” for each group; in contrast, 40% had the same impression regarding “poor people”).

how tax funds will be used.²⁸⁹ There is also a potential redistribution reinforcing element to encouraging participation in tax policy making: if the result of increased participation is increased redistribution, evidence suggests that the redistribution will, at least to a point, result in increased democratic participation.²⁹⁰

These possibilities are speculative—those *potential* effects are not the focus on the framework presented here. Rather, in contrast to the expert theories and prescribed outcomes that have motivated the undemocratic impulse in tax policy making, this framework for democratic tax policy making is not targeted towards specific results.²⁹¹ The benefit contemplated here is in the legitimacy of outcomes yielded by tax policymaking processes. Beyond legitimacy, different theories of democracy suggest that the process proposed here could produce different benefits—consider these as a strong effects version, a medium effects version, and a weak effects version of expected benefits of democratic tax policy making.

In the strong version, a process that facilitates inclusivity and non-domination has the potential to improve the substance of any policy. Thus, more included interests who are able to debate policies in conditions that do not facilitate the domination of particular viewpoints may have a better chance to compromise and agree with one another, shaping preferences and help participants to reach a common understanding.²⁹² Better tax policy and a more informed and satisfied democratic community would follow.

In the medium version, the process does not achieve the deliberative democracy ideal of productive compromise, but can create conditions to reach a tentative deal that will hold until the next round. The institutions do not shape preferences, but rather reveal acceptable outcomes that are context dependent.²⁹³ Thus, successive satisfactory rounds create a functioning political equilibrium of sorts.

In the weak version, the outcomes simply do better than the current policymaking process at *not* catering to the same dominant interests over and over again. The new mechanisms “alter the relative distribution of power among participants in the policymaking process,”²⁹⁴ so those groups

²⁸⁹ Yair Listokin & David M. Schizer, *I Like to Pay Taxes: Taxpayer Support for Government Spending and the Efficiency of the Tax System*, 66 TAX L. REV. 179 (2013).

²⁹⁰ See Andrea Louise Campbell, *Universalism, Targeting, and Participation*, in REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 123 (Joe Soss et al. eds., 2007) (showing that universal programs like Social Security are successful at prompting increased democratic participation among low-income beneficiaries).

²⁹¹ Cf. GUTMANN, *supra* note 157, at 96.

²⁹² *Id.*

²⁹³ Steinmo summarizes sort of outcome in simple terms: “rationality itself is embedded in context.” *Id.* at 7. Steinmo associates this “institutional” approach with Aristotle, Montesquieu, and Madison. *Id.* at 11 n.10.

²⁹⁴ *Id.*

with less voice historically or recently will take on stronger roles over time.²⁹⁵ Note that this weak version is consistent with some recent tax scholarship that has expressed a concern for domination in the substance of tax policy. For example, Ari Glogower recently argued in support of more robust taxation of capital income by reference to a theory of relative economic power.²⁹⁶ The basic idea is that economic inequality—including not just taxable income but also capital accumulation—gives rise to various pathologies that promote social and political inequality, and thus that the tax system should work to reduce economic inequality in order to reduce other ill-effects on society.²⁹⁷ But, again, the process-oriented argument presented here is focused on how inequalities might come to bear on tax policy making, and seeks to diagnose (in the framework) and counteract (in the proposals) power imbalances that might be imprinted on newly enacted tax policies.

One potential objection to democratic processes generally is the Arrow theorem notion that majoritarian preferences are unstable and thus a majority-based democratic decision reflects, at best, fleeting preferences.²⁹⁸ This instability can be re-cast, however, as a benefit in an iterative decision process. As long as the process is designed to promote the democratic legitimacy of any particular decision, changes over time—and even changes that are evidence of inconsistent preferences—are not a problem for the democratic process unless the changes themselves run afoul of other considerations in tax policy making.²⁹⁹

It is also possible that a *democratic* lack of stability will have an overall positive effect on the operation of the tax system. Perhaps individuals who are unsatisfied with a particular decision outcome at any given time will take comfort in knowing that they have an opportunity to engage in a subsequent decision-making process, with the possibility of a different outcome simply because it is a different iteration of the process. Unstable substantive policy may actually contribute to greater democratic legitimacy, even for the perceived losers in any particular round, than would be achieved with less varying policy outcomes. This, in turn, could help achieve greater faith in the tax system, including both the process and the substantive rules that result, that would bolster the democratic citizenship elements of taxpaying.

One final note on what to expect from these mechanisms. Although it is in many circumstances important that decision-making procedures not be too costly, basic cost-benefit analysis of the stakes in federal tax policy making leads to the conclusion that very high decision-making costs should be acceptable in this context. Tax rules have enormous financial and other effects. The reputedly enormous lobbying efforts related to the 1986 Tax Reform Act amounted to something

²⁹⁵ Cf. Glogower, *supra* note 40.

²⁹⁶ *Id.* at 1428, 1449.

²⁹⁷ *Id.*

²⁹⁸ See *supra* note 133 and accompanying text.

²⁹⁹ For example, although stability is seen as a virtue in tax policy, the tax system over the past few decades has been highly unstable, with income tax rates moving up and down, capital gains moving up and down, and estate and gift rates and exemptions shifting significantly and repeatedly. Whether or not the sort of hyper-democratic process I suggest here will result in more or less overall stability than the existing system is difficult to say, but certainly the current baseline cannot be described as stable. See generally, Choi, *supra* note 105, at 37–38 (considering stability in tax laws imposed by way of entrenchment devices from a democratic perspective).

on the order of \$6 million invested by private parties while the income tax the first year following the enactments of that law raised \$400 billion.³⁰⁰ Still, this proposed tolerance for high costs should be tempered by the form of those costs—my intuition is that *expense* should be permissible, but *time* may not be if the result is inertia that preferences the status quo.³⁰¹

Finally the existence of the JCT apparatus—and its centrality in tax lawmaking, notwithstanding critique introduced here regarding some ways in which JCT expertise comes to bear—provides some inspiration for how Congress might legislate with more precision in other areas of law, and suggests that tax policy might be a site for further policymaking innovations in the future.³⁰² Effective democratic tax policy making might represent a vanguard policy innovation that can be spread to other areas of law.

V. CONCLUSION

This Article begins by discussing the process-based criticisms of the Tax Cuts and Jobs Act in 2017 and the Affordable Care Act in 2010. Viewed through the framework presented here—inclusivity of affected interests, and non-domination—the democratic legitimacy of the processes in 2017 and 2010 are more clearly distinguishable. The process that led to the enactment of Affordable Care Act was broadly inclusive, but featured domination by various powerful interests,³⁰³ with some moments of transparency.³⁰⁴ The 2017 Tax Act was both exclusive and

³⁰⁰ Shaviro, *supra* note 140, at 73.

³⁰¹ See Adrian Vermule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 363 (2004) (proposing that congressional procedures should be structured to “encourage technically efficient use of constrained legislative resources, especially time,” and arguing that this is consistent with constitutional design); see also Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998) (analyzing PAYGO rules as imposing procedural costs on Congress in its attempts to enact new spending programs).

³⁰² See Weisbach, *supra* note 50.

³⁰³ For example, the pharmaceutical industry succeeded in blocking drug-price negotiations for prescription drugs purchased for Medicare recipients, in exchange for agreeing to modestly reduce drug prices—this came at a cost to the Federal government of several hundred billion dollars. See IAN SHAPIRO & FRANCES MCCALL ROSENBLUTH, RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF 105 (2018).

³⁰⁴ See CONG. BUDGET OFFICE, SELECTED CBO PUBLICATIONS RELATED TO HEALTH CARE LEGISLATION, 2009-2010 (Dec. 2010), <https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/reports/12-23-selectedhealthcarepublications.pdf> (“In the course of the deliberations over health care legislation, [the CBO] provided a wide variety of estimates and other analysis regarding the impact of the proposals... That process began in early 2009 and continued past enactment of the legislation in March [2010].”); Joe Eaton, *Lobbyists Swarm Capitol to Influence Health Reform*, CTR. FOR PUBLIC INTEGRITY (Feb. 24, 2010), <https://publicintegrity.org/health/lobbyists-swarm-capitol-to-influence-health-reform/> (detailing lobbyist disclosures at a midpoint in the enactment process of the Affordable Care Act: both the House and the Senate had passed bills, and the Obama administration was preparing

dominated, with highly limited transparency.³⁰⁵ Although differing in degree, unfortunately this sort of democratically questionable tax policymaking has become the norm.³⁰⁶

Tax policy is sometimes thought of as the means to democratically established ends, communicated as cold dry budget numbers and revenue objectives. This approach to tax policy making necessarily keeps it in the realm of experts, and facilitates its insulation from the democratic community at large. In reality, of course, tax policy is fundamentally social policy, and reflects a variety of value judgments and priorities of the people who have shaped that policy. A truly democratic policy making process, featuring inclusive decision-making processes and protecting against domination, would elevate the democratic legitimacy of the tax system.

In *DEMOCRATIC JUSTICE*, Ian Shapiro argues that “there is no criterion for justice that is entirely independent of what democracy generates.”³⁰⁷ That is, the best outcomes in a democracy are necessarily the products of a democratic process. By this view, whatever the substantive outcomes are, if they result from a democratically-sound process they should be viewed as a step towards democratic justice, a compromise of competing interests in a way that is contingently and temporarily mutually agreeable. This approach—process as justice—suggests that the best answer to some of the fundamental normative debates in tax policy does not lie in expert analysis or prescribed outcomes, but rather in elevating the role of the expressions of the democratic community in the formulation of tax policy, appreciating that “what justice requires is, and is likely to remain, debatable.”³⁰⁸

to carry out negotiations to reconcile the two); Robert Pear, *Obamacare Took Months to Craft; Repeal May Be Much Swifter*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/us/politics/obamacare-repeal-of-health-law-republicans.html> (summarizing the hearings and markup that resulted in the passage of the ACA, and noting that the Senate Finance Committee markup was “its longest markup in two decades”).

³⁰⁵ See Leibenluft & Huang, *supra* note 2 (describing the enactment process and lack of transparency); *cf.* Wilkinson, *supra* note 4.

³⁰⁶ *Cf.* Wallace *supra* note 35 (discussing the recently enacted CARES Act, which suffered some similar procedural infirmities).

³⁰⁷ SHAPIRO, *supra* note 23, at 41.

³⁰⁸ *Id.* at 19.