

Taxation and Law and Political Economy

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The Law and Political Economy (LPE) project seeks to reorient legal thought by centering considerations of power, equality, and democracy. This reorientation would supplant approaches to legal thought that prioritize efficiency and neutrality, and that imagine a pre-political market “encased” from legal scrutiny or intervention.

This Article seeks to advance dialogue between LPE and tax scholarship. The Article first describes the areas of intersection between the two literatures and then offers general insights each can learn from the other as a basis for further engagement.

The Article describes both why taxation is central to LPE and the project’s importance for the future of tax scholarship and policy. Unlike many other areas of law, the tax system explicitly accounts for economic differences and serves an overt distributive function—two considerations that LPE would center in legal thought. Tax scholarship also reflects both the priorities and considerations at the center of LPE and the market-based frames it would supplant, and thereby offers lessons for how LPE might navigate the insights and limitations of current legal thought and reshape its future. At the same time, LPE offers an opportunity to envision new priorities and analytic modes for tax scholarship, and future possibilities for the tax system.

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I. INTRODUCTION

What role will tax scholarship play in our current moment of social, political, economic, and environmental crisis? Even before pivotal events in 2020 and 2021—the COVID-19 pandemic, mass protests against race-based police violence, and armed conflict at the Capitol¹—the nation faced multiple

¹ See Ed Yong, *How the Pandemic Defeated America*, ATLANTIC (Aug. 4, 2020), <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191> [<https://perma.cc/B89P-RAEE>]; Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/ENP6-BDUH>]; Jennifer Steinhauer, *Police in Washington Seize 5 Guns and Arrest at Least 13 During Violent Capitol Protest*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/live/2021/01/06/us/washington-dc-protests#police-in-washington-seize-5-guns-and-arrest-at-least-13-during-violent-capitol-protest> [<https://perma.cc/B5V9-5QTN>].

crises: economic inequality,² political polarization and failure,³ vulnerable democratic institutions,⁴ and existential environmental threat.⁵

In recent years a group of legal scholars has called to reorient legal thought in response to these crises through an emerging field of legal scholarship termed “Law and Political Economy” (LPE).⁶ Two recent publications seek to advance this project, an essay by Angela Harris and Jay Varellas,⁷ and a feature article by Professors Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman.⁸ Harris and Varellas’s work summarizes the intellectual

² See HEATHER BOUSHEY, UNBOUND: HOW INEQUALITY CONSTRICTS OUR ECONOMY AND WHAT WE CAN DO ABOUT IT 6–7 (2019) (describing how economic inequality “doesn’t just offend our sense of justice” but also “obstructs, subverts, and distorts economic growth”).

³ See SUZANNE METTLER, THE GOVERNMENT-CITIZEN DISCONNECT 1–2 (2018) (describing how in recent decades the public has grown disillusioned with governing institutions, even as government intervention has become increasingly necessary to ensure “economic security, health care, and educational opportunity”); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 808–10 (2014) (describing how political fragmentation has resulted in “the decline of America’s governance capacity”).

⁴ See Chris Kahn, *Half of Republicans Say Biden Won Because of a ‘Rigged’ Election: Reuters/Ipsos Poll*, REUTERS (Nov. 18, 2020), <https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-id-USKBN27Y1AJ> [<https://perma.cc/Y3DG-HZVF>] (reporting on widespread belief among Republicans that the 2020 Presidential election results were tainted by illegal voting, despite lack of proof of such claims).

⁵ See, e.g., Cinnamon P. Carlarne, *The Space Between Grand Optimism and Grim Determination: Finding a Pathway Forward in International Climate Change Law*, 16 LOY. U. CHI. INT’L L. REV. 1, 4 (2020) (describing climate change as “a problem of human health, human rights, security, and fundamental human and planetary well-being”).

⁶ See generally, e.g., Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL’Y REV. 297 (2016) (describing the shortcomings of simplified economic models in law school curricula and presenting new approaches); Frank Pasquale et al., *Eleven Things They Don’t Tell You About Law & Economics: An Informal Introduction to Law and Political Economy*, 37 LAW & INEQ. 97, 97–99 (2019) (seeking to “bridge the gap between scholarship and pedagogy” by shifting the focus from simple economic models to modern data-driven approaches); Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, *Law and Political Economy: Toward a Manifesto*, LPE PROJECT (Nov. 6, 2017), <https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto/> [<https://perma.cc/76ZX-S33C>] (“We propose a new departure – a new orientation to legal scholarship that helps illuminate how law and legal scholarship facilitated these shifts, and formulates insights and proposals to help combat them. A new approach of this sort is, we believe, in fact emerging: a coalescing movement of ‘law and political economy.’”).

⁷ See generally Angela P. Harris & James J. Varellas, *Introduction: Law and Political Economy in a Time of Accelerating Crises*, 1 J.L. & POL. ECON. 1 (2020).

⁸ See generally Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020). This source was published as a “Feature” in the *Yale Law Journal* and is referred to as the “feature article” throughout this text.

foundations of LPE and reassesses these “multiple genealogies” in the current historical moment.⁹ The feature article critiques the dominant mode of contemporary legal thought grounded in neoclassical economics, and then proposes to reorient legal scholarship around the alternative priorities of LPE.¹⁰

These scholars describe how this mode of legal thought and accompanying norms and assumptions—which the feature article terms the “Twentieth-Century Synthesis”—have shielded economic power from meaningful legal scrutiny and weakened public institutions precisely when they may be needed most.¹¹ The LPE alternative, as described in the feature article and the essay, would reorient legal scholarship—and ultimately law and policy—to respond to contemporary crises by centering “concepts of power, equality, and democracy.”¹²

Despite LPE’s breadth and potential relevance across legal scholarship, and despite the centrality of tax to confronting structural and economic inequality, the LPE field has only just begun its substantive engagement with tax scholarship. Professor Martha McCluskey and others have emphasized the importance of tax policy to the broader LPE project.¹³ Neither the feature article nor Harris and Varellas’s essay, however, directly considers the role of tax law and scholarship within LPE.¹⁴

⁹ Harris & Varellas, *supra* note 7, at 8.

¹⁰ See generally Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8.

¹¹ *Id.* at 1806–09, 1821–22; Harris & Varellas, *supra* note 7, at 5.

¹² Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1835. Along the same lines, Harris and Varellas describe the LPE project as working to “broaden discussions of the legal regulation of economic matters beyond the narrow bounds of ‘Law and Economics,’” in part by moving to “analyze markets within their social and political contexts.” Harris & Varellas, *supra* note 7, at 5.

¹³ Martha T. McCluskey, *Framing Middle-Class Insecurity: Tax and the Ideology of Unequal Economic Growth*, 84 FORDHAM L. REV. 2699, 2700 (2016) [hereinafter McCluskey, *Insecurity*]; Martha McCluskey, *Reclaiming Public Fiscal Power for Transforming Precarity*, LPE PROJECT (May 20, 2019), <https://lpeproject.org/blog/reclaiming-public-fiscal-power-for-transforming-precarity/> [https://perma.cc/3TPQ-B43W]; see Anne Alstott, *How the Tax Bills Target Good Government, Workers, and Young People*, LPE PROJECT (Nov. 20, 2017), <https://lpeproject.org/blog/how-the-tax-bills-target-good-government-workers-and-young-people/> [https://perma.cc/W8J3-NQQK]; see also Ajay K. Mehrotra, *The Fiscal Reckoning to Come: Paying for Virus Relief in an Era of Tax Cuts*, LPE PROJECT (May 22, 2020), <https://lpeproject.org/blog/the-fiscal-reckoning-to-come-paying-for-virus-relief-in-an-era-of-tax-cuts/> [https://perma.cc/G2S9-7499].

¹⁴ See Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1807 n.80 (describing LPE’s implications for other fields of law, but not tax). Both the feature article and Harris and Varellas’s essay offer brief references to taxation and tax scholarship. See *id.* at 1798 (mentioning the role of taxation in redistribution); Harris & Varellas, *supra* note 7, at 11 (first citing ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES (2018); and then citing CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973 (2018) as works of tax scholarship that align with LPE). Some of the feature article authors have recognized the important role of taxation in their other work. *E.g.*, K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 67 (2017) [hereinafter RAHMAN, DOMINATION] (listing

This Article seeks to advance dialogue between LPE and tax scholarship. The Article first describes the areas of intersection between the two literatures and then offers general insights each can learn from the other as a basis for further engagement. As such, the Article offers perspective both to LPE scholars in diverse fields who might look to tax law and policy as a tool to advance LPE goals, and to tax scholars interested in the design of a tax system which accounts for LPE priorities. The Article does not offer conclusive answers to the difficult questions and challenges posed by LPE, but seeks to offer a basis for dialogue and subsequent work.

The Article begins by describing the LPE approach and two alternative possible interpretations of its call to reorient legal scholarship. One interpretation would exclude considerations of efficiency and welfare-maximization in legal analysis entirely. The other interpretation would contextualize these considerations in light of LPE's supervening concerns with equality, power, and democracy, but would not wholly dismiss efficiency-based frames. This Article advocates for the latter approach based on its survey of tax scholarship and thought. The experience of tax scholarship demonstrates both the challenges and the advantages of holding in tension economic analysis with attention to considerations of distribution, equality, and power.

After its general description of LPE, the Article then surveys the state of tax law and scholarship and describes how work in tax scholarship has centered the themes of equity, democracy, and economic power that LPE would prioritize, while also incorporating insights from efficiency-based frameworks. The discussion reflects in part the feature article's central critique: Tax scholarship and the development of tax law has been heavily influenced by a principle of market-supremacy, and often at the expense of other values.¹⁵ At the same time, however, tax law stands apart because central elements of the progressive federal tax system—such as the modern progressive income tax and the estate tax—have been primarily justified on explicitly distributional grounds.¹⁶ This pluralistic approach in tax, we suggest, traces back to the work of the same legal realists and progressive reformers that the essay and feature article invoke as foundational to LPE.¹⁷

the progressive income tax as part of the Progressive challenge to laissez-faire thinking); Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, but Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 1982–85, 1990–2013 (2015) (using tax provisions as examples of sunset lawmaking in contrast to sunrise lawmaking and describing their impact on the democratic character of American government).

¹⁵ See *infra* Part III.C (discussing the early and predominate conclusions from optimal tax literature, which reflect both the influence and analytic limitations of the Twentieth Century Synthesis).

¹⁶ See *infra* notes 141–49 and accompanying text.

¹⁷ See *infra* notes 110–18 and accompanying text. In this Article we have also sought to surface some of the essay's and feature article's intellectual foremothers even if not cited directly in those works.

This discussion also highlights the subfields of tax scholarship that have long called for the same reorientations that LPE scholars promote. These include the subfield of “Critical Tax” scholarship, which is rooted in Critical Legal Theory,¹⁸ as well as tax scholarship addressing economic power, fiscal citizenship, and democratic engagement.¹⁹ The discussion then describes the dominant economics-based subfield of tax scholarship, known as optimal tax theory, and explains how optimal tax scholars have often adhered to the premises that LPE scholars contest. Unlike other areas of neoclassical law and economics analysis, however, much of optimal tax analysis also centers questions of distribution and fairness.²⁰ This focus reflects the broader law and economics move to intentionally shift distributive considerations to the tax system, even as it downplayed these considerations in other areas of the law.²¹ As a result, tax scholarship, including work by leading tax economists, has remained committed—at least in principle—to prioritizing considerations of both equity and efficiency.²² Moreover, contemporary scholars use optimal tax analysis to justify and bolster significantly progressive taxation, and focus on making optimal tax models relevant to real world policy challenges.²³

This Article then considers the mutual advantages of engagement between tax scholarship and LPE, and how this dialogue can enable structural policy reform. The experience of tax scholarship offers insights into how LPE might center its priorities of democracy and equality without necessarily abandoning efficiency-based analysis.

The discussion also describes the centrality of taxation to the reorientation of legal thought that LPE hopes to realize. Tax policies can produce, cement, or redress economic outcomes. The meaningful structural economic change that LPE contemplates will necessarily include fundamental fiscal reforms and a reimagined tax system.²⁴ Furthermore, the tax system—unlike many other areas

¹⁸ See *infra* note 150 and accompanying text.

¹⁹ See *infra* Part IV.B.4.

²⁰ See *infra* Part IV.C.2.

²¹ See *infra* note 46 and accompanying text.

²² See *infra* Part V.

²³ See *infra* Part IV.C.

²⁴ This Article assumes that taxes will remain an important source of revenue for the federal government. “Modern Monetary Theory” (MMT) posits that taxes are not necessary to fund government spending in a country with fiat currency (i.e., it is not backed by assets) because the government can print money to pay for public spending. See, e.g., L. Randall Wray, *From the State Theory of Money to Modern Money Theory: An Alternative to Economic Orthodoxy* 29 (Levy Econ. Inst., Working Paper No. 792, 2014), <https://ssrn.com/abstract=2407711> (on file with *Ohio State Law Journal*). Proponents of MMT might argue that taxes are not, in fact, necessary to bring about LPE’s imagined structural changes, as the government can fund increased investments by increasing the money supply. See *id.* Some economists debate the assumptions and implications of MMT. See generally, e.g., Paul Krugman, Opinion, *What’s Wrong with Functional Finance?* (*Wonkish*), N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/opinion/whats-wrong-with-functional-finance-wonkish.html> [<https://perma.cc/3KQ4-DE6E>] (describing basic precepts of MMT analysis and critiquing some elements); Stephanie Kelton, Opinion, *Modern Monetary Theory Is Not*

of law—explicitly and intentionally distinguishes among taxpayers based on their economic differences,²⁵ and thereby offers a model for incorporating LPE priorities in legal theory and design.

At the same time, LPE can offer a broader context for trends and pressures in tax scholarship, and the failure of contemporary progressive tax theory to translate into policy outcomes. Indeed, in recent decades policymakers have undermined the federal tax system's progressivity.²⁶ Top marginal income tax rates, corporate tax rates, and the estate and gift tax have declined, while regressive payroll taxes have steadily increased.²⁷ For instance, although top marginal income tax rates have always fluctuated, between 1936 and 1980 they remained at or above 70%.²⁸ Starting in the 1980s, top rates declined steadily, and since 1987 have never exceeded 39.6%.²⁹ This retrenchment of progressive taxation reflects the broader contemporary crises that LPE scholars are seeking to address. While recent political developments offer the possibility of a renewal for progressive taxation, the project of centering tax policy around principles of equality faces persistent challenges. The LPE project would encourage tax scholars to refocus attention on political economy questions, to interrogate market-centric assumptions, and more broadly to embrace qualitative priorities and considerations.³⁰

The remainder of this Article proceeds as follows. Part II briefly summarizes the LPE critique of market-centric approaches to legal thought. Part III then evaluates the proposed LPE reorientations and describes different ways that the LPE perspective could be interpreted. Part IV then describes how these reorientations intersect with tax scholarship. Part V considers the implications

a Recipe for Doom, BLOOMBERG (Feb. 21, 2019), <https://www.bloomberg.com/opinion/articles/2019-02-21/modern-monetary-theory-is-not-a-recipe-for-doom> (on file with the *Ohio State Law Journal*) (responding to Krugman's criticisms); Brian Galle & Yair Listokin, *Monetary Finance* 63 (July 15, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3885966> (on file with *Ohio State Law Journal*) (discussing the monetary finance debate and arguing that monetary finance has only a limited role in funding government spending under certain conditions).

²⁵ See *infra* Part IV.A.

²⁶ See *infra* note 311 and accompanying text.

²⁷ See *infra* notes 302–20 and accompanying text. See generally Thomas Piketty & Emmanuel Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective* (Nat'l Bureau Econ. Rsch., Working Paper No. 12404, 2006), https://www.nber.org/system/files/working_papers/w12404/w12404.pdf [<https://perma.cc/Q2ZZ-DCUK>].

²⁸ *Historical Highest Marginal Income Tax Rates*, TAX POL'Y CTR. (Feb. 4, 2020), <https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates> [<https://perma.cc/37D7-36X8>] [hereinafter TAX POL'Y CTR.].

²⁹ *Id.* Of course, these top marginal rates differ from the effective average rates relevant to evaluating changes in progressivity over time. For discussion of trends in progressivity, see *infra* notes 298–319 and accompanying text.

³⁰ See *infra* Part IV.B. Such qualitative priorities include tax law's effect on taxpayer dignity, collective self-determination, legal transparency, and solidarity within a diverse community.

of this investigation for both LPE and for tax scholarship, and how the insights and perspective of each can inform the other and enable the interventions in legal thought, law and policy that LPE contemplates.

II. THE LPE CRITIQUE

This Part briefly summarizes LPE scholars' interpretation and critique of the current state of legal analysis and scholarship. Readers familiar with the essay³¹ and feature article³² referenced in the introduction may prefer to skip ahead to Part III.

As Professors Harris and Varellas describe, a basic LPE premise is that "law is central to the creation and maintenance of structural inequalities in the state and market."³³ Thus, markets cannot and should not occupy a realm beyond the reach of law. Professors Britton-Purdy, Grewal, Kapczynski, and Rahman's feature article elaborates this critique of the dominant market-centric approach to contemporary legal thought.³⁴ They diagnose the norms and assumptions that came to dominate legal scholarship in the twentieth century as an encompassing view of the law that elevates neoclassical economic analysis while obscuring the role of economic power and structural inequality.³⁵ This pervasive framework, grounded in principles of efficiency, neutrality, and an autonomous market, "encases 'the market'" from critiques based in claims of (in)justice and power dynamics, and largely sidelines economic difference as a concern for the law.³⁶

The feature article describes two historical trends in legal scholarship that converge over the latter half of the twentieth century: first, the ascendancy of modern law and economics, a mode of legal scholarship oriented around the principle of "market supremacy"³⁷ and second, the concurrent elevation of economic power in public law, which encased those aspects of public law from critical assessment and regulation.³⁸

Within the first trend, the feature article describes three related concepts central to law and economics: (1) efficiency, (2) externalities, and (3) transaction costs.³⁹ Efficiency in this case refers to the objective of designing

³¹ See generally Harris & Varellas, *supra* note 7.

³² See generally Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8.

³³ Harris & Varellas, *supra* note 7, at 10.

³⁴ See Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1790, 1794–1818.

³⁵ *Id.*

³⁶ *Id.* at 1784.

³⁷ *Id.* at 1795–96 (describing law and economics analysis as grounded in neoclassical economics); *id.* at 1798 (citing FRANCIS YSIDRO EDGEWORTH, *MATHEMATICAL PHYSICS* (P. Kegan, London, 1881)) (providing a formalization of the original neoclassical conception of the market).

³⁸ *Id.* at 1806–07.

³⁹ *Id.* at 1796–98. Externalities refer to aspects of a transaction that are "external" to it and are thus not accounted for in the transaction. *Id.* at 1798–99 (citing ANDREAS A.

legal rules to minimize costs, as measured in terms of social welfare or wealth.⁴⁰ Externalities and transactions costs act as bridges between idealized neoclassical models of the market and the real world, where markets are embedded in contingent institutions and legal rules.⁴¹ The authors explain that these three “linking theories” have the appeal that they are potentially quantifiable and are justified as advancing the social objective of maximizing total wellbeing.⁴² Together, they form the core of the law and economics approach and support its claims to objective analytic neutrality.⁴³

The LPE perspective critiques this frame as advancing a normatively weighted concept of neutrality.⁴⁴ The feature article argues that this approach to legal analysis suppresses distributional considerations in service of the supervening policy goal of wealth maximization, particularly in areas of private law.⁴⁵ Rather than centering distributional concerns in all legal rules, a standard law and economics model relegates redistributive policy to the income tax system alone, where—according to this view—redistribution can be achieved at the lowest efficiency cost and without distorting other behavioral margins.⁴⁶

PAPANDREOU, EXTERNALITY AND INSTITUTIONS 169–71, 197 (1994)). “Transaction costs are costs of market exchange,” such as locating parties and negotiation costs. *Id.* at 1799 (citing R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 395 (1937)) (theorizing that firms emerge whenever transactions costs are higher than the cost of an existing firm internalizing decision making in its command structure).

⁴⁰ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1796–97.

⁴¹ *Id.* at 1800 (citing R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960)) (arguing that litigation and legislation do not always lead to fair or efficient resolution of externality problems, and that parties should bargain with one another to apportion expenses resulting from externalities).

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *Id.* at 1797 (citing QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 5–7, 13 (2018)) (discussing how neoliberals have historically used the state to insulate markets from political change and democratic demands for equality); *id.* (citing WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* 46 (Patrick Camiller trans., 2014)) (similar). In developing this framing, the feature article cites to Zachary Liscow, *Is Efficiency Biased?*, 85 *U. CHI. L. REV.* 1649 (2018). *Id.* at 1790. Professor Liscow argues that Kaldor-Hicks efficiency is biased in favor of the wealthy in part because it seeks to maximize willingness to pay. Liscow, *supra* at 1652. Because the wealthy are able and willing to pay more, maximizing efficiency tends to produce policies that favor the rich. *Id.* at 1656. Professor Liscow then argues that this pro-rich bias has been downplayed because distributional issues were expected to be dealt with via redistributive taxes. *Id.* at 1653. In some cases, however, the distributional impact of nontax policies is not redressed through the tax system. *See id.* at 1654; *cf.* Richard L. Revesz, *Regulation and Distribution*, 93 *N.Y.U. L. REV.* 1489, 1511–25 (2018) (arguing that the income tax system is “ill suited” to effect redistribution in all cases).

⁴⁶ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1798 & n.51 (citing Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 *J. LEG. STUD.* 667 (1994)); *see also* discussion *infra* notes

Meanwhile, the possibilities of externalities and transaction costs justify only limited policy interventions in the market and only as necessary to advance the efficiency objective.⁴⁷

The law and economics approach refashioned legal analysis, particularly in areas of private law. For example, the authors argue that it narrowed the focus of antitrust law to the pursuit of “consumer welfare,” in a departure from its historic concern with market power and concentration.⁴⁸ Similarly, law and economics influenced the approach of modern intellectual property law,⁴⁹ with a focus on optimizing propertization to maximize efficiency.⁵⁰

The feature article then argues that the ascendance of law and economics in private law converged with a second concurrent trend in legal thought: privileging the role of economic power in public law. This second trend comprised two elements. First, public law scholarship and jurisprudence

218–38 and accompanying text (describing how a similar logic has led some tax scholars to conclude that redistribution is best achieved through a tax on labor income alone).

⁴⁷ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1799 (“Law and economics, elevated amid the antiplanning rhetoric of the Chicago school, was inevitably itself a form of planning. Planning was essential if politics was to serve the goal of efficiency, precisely because ‘transaction costs’ and ‘externalities’ meant that efficiency in many cases required redesigning the market.”); *id.* at 1799–1800 (citing Coase, *supra* note 41) (exemplifying the Chicago school’s anti-planning philosophy by arguing that law’s resolution of externality problems can be both inefficient and unfair, and that the law should instead protect market actors as they engage in mutually beneficial bargaining to efficiently allocate entitlements and thereby maximize aggregate welfare).

⁴⁸ *Id.* at 1801–02 (citing Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980–81 (2019) (writing that, while “[s]tructural prohibitions have been a traditional element of American economic regulation,” they have been weakened by modern lawmakers and judicial interpretations of antitrust law)); *id.* (citing Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235, 236–37 (2017) (arguing that “[a] revived antitrust movement could play an important role in reversing the dramatic rise in economic inequality” spurred by Reagan era policies that entrenched monopolies and oligopolies)).

⁴⁹ *Id.* at 1801–03 (first citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 403–19 (2003); and then citing William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325–26 (1989) (focusing on positive analysis of copyright law and the extent to which “copyright law can be explained as a means for promoting efficient allocation of resources”)).

⁵⁰ *Id.* at 1802–03. Professor Kapczynski has developed this argument in prior work. *E.g.*, Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 993–1006 (2012) (describing IP scholarship’s narrow focus on efficiency and highlighting deviations therefrom). The feature article contrasts holdings in earlier eras such as *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (applying “elevated equal-protection review to laws falling disproportionately on the poor”), with more recent holdings denying equal protection scrutiny for economically disadvantaged groups as a class, such as in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 2 (1973). Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1807–08; *see also* *Washington v. Davis*, 426 U.S. 229, 247–48 (1976) (rejecting heightened equal-protection review of policies that reproduced patterns of structural inequality).

embraced “thin” versions of liberal values such as freedom, equality, and state neutrality while also downplaying considerations of “economic and other structural forms of inequality.”⁵¹

At the same time, the feature article argues, the courts extended protections for public and political speech to business activity and thereby elevated the role of economic power in these domains.⁵² For example, the Court broadened the scope of the First Amendment to protect commercial speech⁵³ and limit restrictions on advertising⁵⁴ and political contributions.⁵⁵ These shifts in public law elevated protections for businesses and wealthy individuals while suppressing protections for individuals from “market-facilitated inequalities.”⁵⁶ These developments coincided with public law’s increased skepticism of

⁵¹ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1806–07. For one example, in the field of constitutional law courts have narrowed the focus of Fourteenth Amendment equal protection jurisprudence to exclude considerations of economic and structural inequality. *Id.* at 1806–08.

⁵² *Id.* at 1807 (“These developments . . . assimilat[ed] the political activity of democracy to market paradigms, by turn celebrating a commercialized public sphere as a paragon of self-rule and denigrating the actions of actual government institutions as interest-group capture and entrenchment.”).

⁵³ *Id.* at 1810 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (expanding First Amendment protection to the sale of prescription records)). Professor Britton-Purdy has similarly argued elsewhere that the antidistributional principal in First Amendment jurisprudence reflects an “antistatist fear of entrenchment” by government officials. Jedidiah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2161 (2018). In shifting distributional judgments away from the state, however, the Court places them in the market, which suffers its own inequitable distributional pathologies. *Id.* In doing so, the Court prevents partisan entrenchment in favor of “class entrenchment: the concentration of political power in a relatively small and privileged echelon of Americans.” *Id.* at 2162.

⁵⁴ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1809–10 (first citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); and then citing *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (cases limiting regulations on alcohol and tobacco advertising)).

⁵⁵ *Id.* at 1809 (first citing *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (holding that limitations on independent expenditures by individuals and groups as well as limitations on expenditures by a candidate from his personal funds violate the First Amendment); and then citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 315 (2010) (holding that the First Amendment prohibits the government from suppressing political speech and thus contributions on the basis of a speaker’s corporate identity)).

⁵⁶ *Id.* at 1817–18; *see also id.* at 1806–08 (discussing the Court’s failure to expand equal protection analysis to encompass market-driven inequality). Several articles by Professors Grewal and Britton-Purdy follow this same reasoning to interrogate the intellectual foundations and political effect of neoliberalism. *See* David Singh Grewal & Jedidiah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 1 (2014) [hereinafter Grewal & Purdy, *Introduction*]; David Singh Grewal & Jedidiah Purdy, *Inequality Rediscovered*, 18 THEORETICAL INQUIRIES L. 61, 78 (2017) [hereinafter Grewal & Purdy, *Inequality*]. These works explore how neoliberalism, as a style of argument and policy doctrine, shields the market from political intervention and obscures how market-oriented policies themselves manifest and enforce distributional choices.

intervention by public officials to alter distributional outcomes, based on fear of entrenched interest-group capture.⁵⁷

In the feature article's account, these two developments in public and private law converge to shield economic activity from legal scrutiny, reorienting public life around an autonomous market, aligning liberty with market participation, and empowering commercial public speech while subjecting public interventions in the market to greater scrutiny and skepticism.⁵⁸ At the same time, the market-centric approach sidelined consideration of economic difference, leaving economic inequality beyond the scope of problems that should be corrected by law and government policy.⁵⁹

⁵⁷ See Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1807.

⁵⁸ *Id.*

⁵⁹ See *infra* Part IV.A (describing how tax law centers the evaluation and remediation of economic difference, even within the standard law and economics approach).

The LPE critique outlined in these works draws from the feature authors' prior work⁶⁰ and prior literature in the emerging field of LPE.⁶¹ It also builds upon a broad literature critiquing or questioning the market-centric premises in legal scholarship.⁶² Professors Harris and Varellas's essay similarly traces the

⁶⁰ See, e.g., JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* 76–101 (2019) (describing the pervasive intersection of economic inequality, the built environment, and differential environmental vulnerability); Jedediah Purdy, *Climate Change and the Limits of the Possible*, 18 *DUKE ENV'T'L L. & POL'Y F.* 289, 289 (2008) (proposing a dynamic view of political economy to help see beyond the problem of climate change); Jedediah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 809 (2018) (exploring distributive questions surrounding environmental justice); Grewal & Purdy, *Introduction*, *supra* note 56, at 6 (defining neoliberalism as a set of arguments, commitments and frameworks “promoting capitalist imperatives against countervailing democratic ones”); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *LAW & CONTEMP. PROBS.* 195, 195–96 (2014) (arguing that neoliberal tenets such as freedom of contract are woven into fundamental legal principles, and comparing emerging constitutional neoliberalism with the *Lochner* era); Purdy, *supra* note 53, at 2161 (arguing that the Supreme Court's “weaponized” First Amendment jurisprudence is at odds with neutrality and has “limit[ed] the power of government to implement distributional judgments in key areas of policy”); David Singh Grewal, *The Laws of Capitalism*, 128 *HARV. L. REV.* 626, 626 (2014) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014)) (noting that a return to rising inequality after the brief post-war boom calls for resurrecting questions about economic structure, unequal wealth and how to redress it, and differential power distributions between income groups); Amy Kapczynski, *The Law of Informational Capitalism*, 129 *YALE L.J.* 1460, 1460 (2020) (constructing an account of “informational capitalism” and arguing that it poses a threat to equality and self-government, and that “questions of data and democracy” must be at the core of our concerns); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 *COLUM. L. REV. ONLINE* 179, 181 (2018) (arguing that the Supreme Court's interpretation of the First Amendment threatens democratic authority over markets); Amy Kapczynski, *Free Speech, Inc.*, *BOS. REV.*, Summer 2019, at 156, 156 (tracking how the Supreme Court has used the First Amendment to undermine the regulatory state, arguing that in doing so it has undermined democratic public power to hold businesses accountable); Kapczynski, *supra* note 50, at 993–1006 (arguing that IP scholars should incorporate values other than efficiency, with a specific focus on distributive justice and privacy); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *CARDOZO L. REV.* 1621, 1622 (2018) [hereinafter Rahman, *New Utilities*] (arguing for a reorientation of public utility regulation to focus on inequality and questions of power); RAHMAN, *DOMINATION*, *supra* note 14, at 40–43, 205 nn.54–71 (drawing upon political economy rooted in the reform movements of the early twentieth century progressives to answer questions about the problems of economic inequality and power in the post-Great Recession United States); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 *S. CAL. INTERDISC. L.J.* 315, 320–21 (2018) (advocating for power-building regulatory reform that engages and empowers traditionally diffused, under-resourced, and marginalized stakeholders).

⁶¹ For examples, see generally *supra* note 6.

⁶² E.g., A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 *HARV. L. REV.* 1655, 1655 (1974); McCluskey, *Insecurity*, *supra* note 13, at 2700; John D. Haskell & Ugo Mattei, *Introduction*

intellectual genealogy of LPE and its origins in prior critiques of the dominance of law and economics in legal thought.⁶³

Perhaps most prominently, LPE draws from the insights and intellectual frameworks developed in the field of Critical Legal Theory, including its body of scholarship interrogating facially neutral legal rules that embed structural imbalances and policy preferences.⁶⁴ The feature article also invokes the early twentieth-century legal realist tradition, which understood the economy as embedded in a contingent political ordering, and to egalitarian critiques of market-centric views of the law.⁶⁵ For example, the authors cite the work of the legal realist and economist Robert Hale, who viewed economic life as embedded in relationships of coercion, with the parties' coercive power determined by their legal entitlements.⁶⁶

to RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW 1, 2 (Ugo Mattei & John D. Haskell eds., 2015) (observing, in response to the economic crisis arising from collapse of the housing bubble around 2007–2009, that “the economic ideas of the last 40 or so years are no longer valid” and urging shifts in focus); *Appeal Events*, ASS'N FOR PROMOTION POL. ECON.& L., <https://www.politicaleconomylaw.org/> [<https://perma.cc/2E9G-LK62>] (listing past conferences, for example the June 2013 session titled, “Toward Law and Political Economy: Transforming Unequal Power Through Heterodox Theory”).

⁶³ Harris & Varellas, *supra* note 7, at 6–12.

⁶⁴ See Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1792 (“Attention to political economy today requires attentiveness to the ways in which economic and political power are inextricably intertwined with racialized and gendered inequity and subordination.”); see also *id.* at 1823 (“[T]he move to political economy requires a shift . . . from the individual to the structural level, looking not just at individualized experience but rather at how law and policy construct systematic forms of hierarchy and domination through a market that is always embedded in social relations.”); *id.* (“This is one of the key insights of critical legal thought and literature from both feminists and scholars of critical race theory.” (citing DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 4–5 (2014))); Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 1 (1986) (“assess[ing] the significance and import of the critical legal studies movement,” which challenges the orthodoxy of liberal legal scholarship by building off of legal realism and western Marxism); IAN WARD, INTRODUCTION TO CRITICAL LEGAL THEORY 1, 1 (2d ed. 2004) (providing an expansive understanding of critical legal theory and excavating “certain theories of law and politics which are often alleged to be representative of modernity”); Peter D. Swan, *Critical Legal Theory and the Politics of Pragmatism*, 12 DALHOUSIE L.J. 349, 355 (1989) (“Critical Legal Studies views legal reasoning as an attempt to reconcile people to the status quo . . .”).

⁶⁵ Britton-Purdy, Grewal, Kapczynski & Rahman *supra* note 8, at 1792.

⁶⁶ See *id.* at 1796 (citing Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923)); Harris & Varellas, *supra* note 7, at 8 (citing Hale, *supra*); see also Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1824 (“As the Twentieth-Century Synthesis was consolidated into neoliberalism, there was an outpouring of interest from legal scholars and others concerning the appropriate scope and limits of private ordering in light of a variety of theories of distributive justice, many with an explicitly egalitarian dimension.”); see also Grewal & Purdy, *Inequality*, *supra* note 56, at 73–80 (detailing the skepticism of market-centric views of the law from scholars hailing from both ends of the spectrum).

The feature authors argue further that, although the market-centric approach was “always contested . . . and many tools to contest it have been built over the decades,” the current moment nonetheless calls for a fundamental “reassessment of legal scholarship and its tasks.”⁶⁷ Current LPE scholarship brings together these existing scholarly threads and calls for renewed attention to these themes developed in prior legal scholarship.⁶⁸

Finally, Harris and Varellas also argue that scholars in other academic fields have consistently engaged with challenges that have been treated as beyond the scope of much legal scholarship and analysis.⁶⁹ LPE scholarship seeks to infuse legal analysis and institutions with multidisciplinary perspectives that have developed conceptions of structural inequality, and approaches to advancing anti-subordination through economic and political institutions.⁷⁰

III. INTERPRETING THE LPE REORIENTATION

The feature article presents a series of “reorientations” that would center legal analysis around economic and structural forms of inequality in both public and private law.⁷¹ Rather than accepting “the narrow bounds” that law and economics considers appropriate for economic regulation, LPE would “broaden discussions of the legal regulation of economic matters.”⁷² The LPE approach is grounded in the “political economy” perspective, which seeks to “analyze markets within their social and political contexts”⁷³ and begins with the “understanding that the economy is always already political in both its origins and its consequences.”⁷⁴

The growing body of LPE literature has begun to operationalize this reorientation, but neither the essay nor the feature article specifies exactly what it might mean to re-center legal thought around the alternative priorities

⁶⁷ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1791; *see also* Hunt, *supra* note 64, at 7 (detailing the critical legal studies movement, which challenges the liberal “orthodoxy in legal scholarship” that benefitted the Synthesis).

⁶⁸ *See* Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1833–34.

⁶⁹ *See* Harris & Varellas, *supra* note 7, at 8–12. The authors describe, as examples of these considerations, the topics of “financialization,” labor insecurity, and the “algorithmic intermediation of life.” *Id.* at 2–3.

⁷⁰ *Id.* at 6–7.

⁷¹ *See* Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1818–32.

⁷² Harris & Varellas, *supra* note 7, at 5.

⁷³ *Id.*

⁷⁴ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1792; *id.* at 1792 n.28 (citing Samuel Bowles & Herbert Gintis, *Power and Wealth in a Competitive Capitalist Economy*, 21 PHIL. & PUB. AFFS. 324, 324 (1992) (“The term political economy, once synonymous with economics, now generally refers . . . to the study of the interface between economy and state . . .”) (emphasis omitted)); *see also id.* at 1818 (describing and advocating the legal realist position that “law generates the very order of rights that market advocates invoke to define the boundaries of ‘the economy’”); *id.* at 1796 (citing Hale, *supra* note 66, at 470 (arguing that economic activity is characterized by a system of mutual coercion)); Harris & Varellas, *supra* note 7, at 6–7.

emphasized in LPE. A basic question for LPE scholars seeking to operationalize these proposed reorientations of legal thought is: what role, if any, would an LPE approach preserve for economics-oriented insights and analysis?

This Part offers two possible interpretations of the LPE reorientations, which is each described below after a further elaboration of the proposed reorientations. Under the first interpretation, LPE's goals might require a conclusive departure from the analytic modes of the law and economics movement, and thus would reject principles such as efficiency in whole. The second interpretation, in contrast, might still allow space for insights from economic models and economics-based modes of analysis, albeit in a properly circumscribed role. Part IV returns to these considerations, and describes how, based on our experience with and hope for tax scholarship, this latter interpretation of the framework suggests a way forward for LPE scholars that incorporates insights from law and economics analysis. This approach would hold in tension the priorities of economic analysis and redistribution, but without enabling the former to unduly obstruct or dilute structural reforms which are warranted or needed.

A. *The LPE Reorientation*

The feature article describes three related conceptual shifts to reorient the law consistent with LPE priorities. The first would shift the center of legal analysis from the efficiency criterion to relationships of power.⁷⁵ In recent decades the dominant mode of legal analysis relegated questions of power and distribution to “nonproblem[s],”⁷⁶ whereas LPE seeks to center these considerations in legal thought in order to expose them to renewed scrutiny.⁷⁷ This project has both positive and normative implications—it asks who has power in any given legal or economic relationship, as well as who *ought to* have power and why.⁷⁸

The second LPE shift—which is intrinsically related to the first—would ground legal analysis in principles of equality rather than neutrality.⁷⁹ The authors argue that the focus on neutrality in law-and-economics-grounded legal scholarship obscures the “very non-neutral drift toward elite control of

⁷⁵ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1818. For other work by the authors calling for a similar shift, see Rahman, *New Utilities*, *supra* note 60, at 1684–87 (calling for a renewed focus on inequality, power, and accountability in public utility regulation).

⁷⁶ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1806.

⁷⁷ *See id.* at 1833.

⁷⁸ *Id.* at 1820.

⁷⁹ *Id.* at 1823–32; *see also id.* at 1824 (“We suggest orienting law and policy analysis around an ideal of equality—particularly a vision of equality animated by a commitment to self-rule and sensitive to the importance of social subordination along intersectional lines.”).

government.”⁸⁰ Shifting the focus from neutrality to equality would instead consider commitments to equality “animated by a commitment to self-rule and sensitive to the importance of social subordination along intersectional lines.”⁸¹

These two shifts create the conceptual space for a third and more fundamental reorientation, “from antipolitics to democracy.”⁸² The market-centric approach obscures the role of policy choices in shaping market outcomes.⁸³ In doing so, it precludes meaningful political intervention in the existing economic order.⁸⁴ Reorienting legal analysis from “antipolitics to democracy” recognizes that our laws *create* the economic order.⁸⁵ This order should therefore be accountable and responsive to the democratic process.⁸⁶

B. *The Exclusive Interpretation*

Under an exclusive interpretation of LPE’s proposed reorientation of legal thought, law and economics modes of analysis focusing on wealth maximization, externalities, and transaction costs become fundamentally flawed and should be entirely dismissed. By this view, the market-centric legal analysis has yielded incremental and inadequate policy responses that necessarily lead to

⁸⁰ *Id.* at 1824; *see also* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 564 (2014) (advocating “Economic-Elite Domination” theories because “[m]ultivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy”).

⁸¹ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1824; *see also* Grewal & Purdy, *Inequality*, *supra* note 56, at 76 (describing the skepticism toward the private ordering advocated for by neoliberals, and detailing economist Fred Hirsch’s argument that political intervention is necessary in order to provide citizens the power to “choose among sets of choices,” instead of merely being able to choose among only the choices the market provides (emphasis omitted)).

⁸² Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1827–32.

⁸³ *Id.* at 1827 (“[P]art of the allure of discourses of efficiency and neutrality lies precisely in the claim that these discourses—and the system of market governance itself—can produce optimal outcomes without the messiness of politics and . . . the acknowledgement that political conflict is resolved in an exercise of public power in which some win and some lose.”). *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that market actors can resolve conflicts concerning externalities more efficiently and justly than the legal system); MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1980); F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 107, 114–15, 122 (1982).

⁸⁴ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1827; *see* SLOBODIAN, *supra* note 45, at 2 (discussing how neoliberals have historically used the state to “encase” markets against political change and democratic demands for equality); STREECK, *supra* note 45, at 46.

⁸⁵ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1827, 1833.

⁸⁶ *Id.* at 1827; *see also* Grewal & Purdy, *Inequality*, *supra* note 56, at 76 (detailing Hirsch’s argument that political intervention is necessary in order to provide citizens the power to choose among sets of choices and to “shape the playing field and the rules themselves”).

modest government intervention, if any.⁸⁷ Moreover, these modest interventions tend to preserve an unjust status quo and preclude “transformative structural reform.”⁸⁸ Regulating at the margins to optimize policy from a cost-benefit perspective cannot address current structural economic and social challenges. Doing so may in fact exacerbate these problems. Because law and economics fails to address structural inequality and inhibits legal analysis with a continued disregard for economic difference, it must be excluded from legal thought.

This exclusive approach, however, poses familiar challenges regarding tradeoffs. For instance, some legal reforms might yield significant social benefits but entail less consequential violations of the LPE framework’s motivating principles. It is not clear how to evaluate such reforms under the exclusive interpretation. Indeed, a blanket rejection of law and economics analysis—as LPE scholars at times appear to suggest—would not eliminate a number of real challenges and considerations central to the economic approach.⁸⁹ These include choices in accounting for incentives and the value of *ex ante* policymaking, in calibrating the respective roles of private markets and public intervention, and in allowing individuals to enjoy (or face) the consequences of their private choices when concerns of undue advantage (or coercion) are absent or diminished.⁹⁰

Consider, for instance, the infamous “window tax” imposed in England throughout the eighteenth century.⁹¹ The law established what was intended to be a progressive property tax on residences, based on the number of windows in a building (with an exemption for “cottages” with seven or fewer windows).⁹² This ostensibly elegant and simple tax instrument avoided time consuming and subjective property assessments—the number of windows is determinable from the exterior. But instead of administrative convenience, the measure yielded a counterproductive series of taxpayer responses and administrative quandaries.⁹³ Some wealthy people began to fill in their windows while some lower-income people (living, for example, in multifamily tenements) could not afford to and

⁸⁷ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1828.

⁸⁸ *Id.*

⁸⁹ *Cf.* Neil H. Buchanan, *The Role of Economics in Tax Scholarship*, in BEYOND ECONOMIC EFFICIENCY IN UNITED STATES TAX LAW 11, 15, 22 (David A. Brennan, Karen B. Brown & Darryll K. Jones eds., 2013) (critiquing any use of Pareto efficiency as a standard, but endorsing the ongoing reliance on economics in tax scholarship, with a particular emphasis on the usefulness of analyzing behavioral incentives in tax).

⁹⁰ This approach also faces an audience challenge. Adherents of the Synthesis may be unpersuaded by arguments that demand an unqualified rejection of embedded principles that many consider central in legal thought, including accounting for the effects of law and policy on individuals’ wellbeing.

⁹¹ See MICHAEL KEEN & JOEL SLEMROD, REBELLION, RASCALS, AND REVENUE: TAX FOLLIES AND WISDOM THROUGH THE AGES 17–22 (2021); Michael Littlewood, *John Tiley and the Thunder of History*, in 9 STUDIES IN THE HISTORY OF TAX 55, 71–73 (Peter Harris & Dominic de Cogan eds., 2019).

⁹² Littlewood, *supra* note 91, at 72.

⁹³ *Id.*

felt a regressive sting from the tax.⁹⁴ Builders began to remove windows from new residences.⁹⁵ Policymakers were finally swayed to eliminate the window tax after a generation of complaints about the public health effects of reduced air flow.⁹⁶ This failed tax experiment showcases the value of properly contextualized efficiency-based reasoning in tax design: taxpayer incentives and behavioral responses can yield undesirable effects and counterproductive outcomes, even for tax innovations with progressive intentions.

The exclusive approach may therefore be of limited use to legal scholars addressing certain issues of incentives or private choice. A less rigid approach, as detailed next, would avoid these concerns by preserving space for law and economics analysis, albeit in a properly contextualized role.

C. *The Pluralist Interpretation*

LPE's reorientation of legal thought might still allow space for certain insights from the law and economics framework, so long as these considerations are properly qualified and contextualized. This approach might downplay or resituate—but not conclusively reject—market-centric analytic modes.⁹⁷ This interpretation of the LPE reorientation would require reassessing and recontextualizing the traditional methods and conclusions of law and economics to prioritize considerations of power, equality, and democracy. Moreover, it would not dismiss entirely goals such as wealth maximization and efficiency, but instead would require additional justification when pursuit of these goals fails to account for inequality or power imbalances.

A simplified explanation of the theory of “second-best” economic reasoning offers an example for this kind of rebalancing. The theory holds that if any optimality condition in an economic model cannot be satisfied—such as a hypothetically “free” market with no distortions or power imbalances—it is possible to improve outcomes by introducing additional market distortions through government intervention.⁹⁸ In other words, while a first-best model will prioritize hypothetical conceptions of a free market, a second-best model could find that government intervention improves outcomes, perhaps because it corrects for other distortions.⁹⁹ Second-best economic thinking foregrounds market imperfections.¹⁰⁰ In doing so, it accepts positive outcomes from

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 73.

⁹⁷ See *infra* Part IV.B (discussing the implications of the LPE framework for tax scholarship).

⁹⁸ See generally R.G. Lipsey & R.K. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956) (introducing and describing the theory).

⁹⁹ Dani Rodrik, *Why Do Economists Disagree?*, DANI RODRIK'S WEBLOG (Aug. 5, 2007), https://rodrik.typepad.com/dani_rodriks_weblog/2007/08/why-do-economis.html [<https://perma.cc/ENN6-JZMF>].

¹⁰⁰ Lipsey & Lancaster, *supra* note 98, at 12.

interventions that would be suboptimal under a first-best model, such as government intervention.¹⁰¹ Such second-best economic reasoning, however, still accepts the general logic of first-best models, but merely qualifies their workings and conclusions.¹⁰²

This pluralist interpretation of the LPE reorientation—as a structure for rebalancing the focus of legal scholarship without necessarily rejecting outright law-and-economics analytic modes—continues a century-long tradition in legal scholarship. The early twentieth-century legal realists and progressives that the LPE authors invoke in the feature article and essay advocated for such balancing.¹⁰³

The approach of legal realist and economist Robert Hale exemplifies this balancing of the market and government intervention. As the authors note, Hale criticized the concept of natural property rights¹⁰⁴ and believed that the enforcement of private property rights embedded coercion in all market exchanges.¹⁰⁵ Although Hale advocated for reconstructing property rights, he also appreciated the utility of markets, contracts, the price mechanism, and private property.¹⁰⁶ As historian Barbara Fried has noted, Hale advocated for a

¹⁰¹ Rodrik, *supra* note 99.

¹⁰² See generally *id.* (explaining the difference between what he terms “first-best” and “second-best” economists).

¹⁰³ See *supra* note 66 and accompanying text; see also Harris & Varellas, *supra* note 7, at 8; Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1824 (first citing BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998); and then citing RAHMAN, *DOMINATION*, *supra* note 14, at 66–68) (explaining that the three normative fronts of the LPE framework “each develop[] longstanding arguments running back to the Realist and Progressive Eras”); RAHMAN, *DOMINATION*, *supra* note 14, at 74 (describing the work of Robert Hale); K. Sabeel Rahman, *The Way Forward for Progressives*, *NEW REPUBLIC* (Nov. 2, 2016), <https://newrepublic.com/article/138325/way-forward-progressives> [<https://perma.cc/JH5A-ZFW9>] (describing a “rich history of more radical progressive economic populisms” that inform modern progressivism, including the work of early twentieth century progressive economists Richard Ely, John Commons, and E.R.A. Seligman).

¹⁰⁴ Natural property rights embody an absolutist conception of private property protections against any and all government intervention, which the Supreme Court embraced and promoted in the *Lochner* era. Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1795 n.36 (citing FRIED, *supra* note 103). Fried notes that Hale critiqued the normative notion of a “constitutionally protected sphere of liberty interests and property rights.” See FRIED, *supra* note 103, at 16.

¹⁰⁵ Hale, *supra* note 66, at 470, 493 (“The channels into which industry shall flow, then, as well as the apportionment of the community’s wealth, depend upon coercive arrangements.”); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *COLUM. L. REV.* 603, 628 (1943) [hereinafter Hale, *Duress*] (arguing that the enforcement of property rights “restricts economic liberty”).

¹⁰⁶ Hale, *Duress*, *supra* note 105, at 628 (“If more ambitious governmental activities, in the way of public works, government enterprises and deficit financing at appropriate times, would result in full employment in periods when there would otherwise be business stagnation, then these government activities, far from reducing the economic liberty of individuals, might greatly enlarge it.”); *id.* (“Moreover, by judicious legal limitation on the

“middle way,” which fell somewhere between “programmatically socialism” and “the possessive individualism of nineteenth-century laissez-faire liberalism.”¹⁰⁷ Hale’s thinking embodies a kind of ideological balancing, and other legal realists and early progressives similarly embraced a “middle way” approach.¹⁰⁸ For instance, President Franklin Roosevelt expressed such a balanced approach when calling for a renewed commitment to cooperation between government and private business.¹⁰⁹

The modern federal income tax system also finds its roots in this pluralistic progressive intellectual movement.¹¹⁰ Early twentieth-century progressive economists such as E.R.A. Seligman and Richard Ely advocated a graduated income tax in order to address the unequal distribution of resources and concentrated economic power that the feature article seeks to center.¹¹¹ In doing so, they adopted a balancing strategy that foregrounded issues of distribution and economic power while also accepting that steeply progressive rates could

bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.”); FRIED, *supra* note 103, at 57 (“Hale acknowledged the necessity of private property, as well as the importance of price as a ‘method of regulating consumption’ and rewarding the producer for the costs of production.”).

¹⁰⁷ FRIED, *supra* note 103, at 6 (noting that Hale’s middle way “stopped short of advocating absolute equality of incomes or widespread government ownership of private property”).

¹⁰⁸ *E.g.*, Richard T. Ely, *The Economic Discussion in Science*, 8 SCI. 3, 4 (1886) (“True, I believe that the state has its industrial sphere, and that a larger one than many have been inclined to think; but I hold quite as strenuously that the individual has a sphere of economic action which is an equally important one. I condemn alike that individualism which would allow the state no room for industrial activity, and that socialism which would absorb in the state the functions of the individual.”); see JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920*, at 199 (1986) (arguing that late nineteenth and early twentieth century progressives sought a middle ground between the new socialism and the old liberalism).

¹⁰⁹ See Richard P. Adelstein, “*The Nation as an Economic Unit*”: Keynes, Roosevelt, and the Managerial Ideal, 78 J. AM. HIST. 160, 178 (1991) (describing Roosevelt’s “deep commitment” to the ideal of cooperation between government and private business and a national political economy where business and government worked together for “the good of all”).

¹¹⁰ See generally AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929* (2013).

¹¹¹ *Id.* at 11; cf. Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793, 1797 (2005) [hereinafter Mehrotra, *Envisioning*] (arguing that “the intellectual campaign for an income tax was aimed at reforming the contemporary allocation of fiscal burdens and obligations”); RAHMAN, *DOMINATION*, *supra* note 14, at 67 (noting that Progressive-era economist E.R.A. Seligman argued for a graduated income tax based on “newly emerging theories of marginal utility and diminishing returns” as an example of energy directed toward the “Progressive challenge of overcoming laissez-faire thought”).

risk distorting economic incentives.¹¹² They also worked hard to distance progressive taxation from socialism, perhaps out of a combination of their pluralist commitments and political necessity.¹¹³ Whether done for ideological or practical reasons, these reformer economists' ideological balancing offers a model for a pluralist interpretation of the LPE framework. As described above, the legal realists and progressives who the feature article invokes similarly embraced such pluralism.

The question of how to interpret the LPE framework matters for scholars hoping to operationalize its prescribed reorientations of legal thought. As the following Part IV describes, the experience of tax scholarship—much of which grew out of the work of the progressive era economists—offers lessons in navigating these conflicting commitments and theoretical frames. Tax scholarship accounts for many of the same priorities that are central to LPE, while also incorporating insights from economic analysis. Tax scholarship thus reflects the pluralist approach that this Article advocates. At the same time tax scholarship and tax policy also reflect the influences, norms and assumptions of the law and economics movement, and the tendency to prioritize efficiency over distributional concerns. Part IV subsequently explains how tax scholars can benefit from incorporating LPE's precepts and reinvigorating their focus on questions of equality, power, and democracy.

IV. PERSPECTIVES FROM TAX SCHOLARSHIP

This Part describes how tax scholarship intersects with the proposed LPE reorientations and the broader LPE project. It also demonstrates how tax law and scholarship has been influenced by both the typical law and economics modes of analysis as well as LPE priorities. As described above, LPE scholars have only begun to engage with tax scholarship.¹¹⁴ This Part begins the work of providing a comprehensive account of taxation and tax thought for this emerging field, to provide a basis for future engagement between LPE and tax scholarship.

The failure of the tax system to realize its distributional potential is implicit in the feature article's critique of the market-centric approach to legal

¹¹² Mehrotra, *Envisioning*, *supra* note 111, at 1851 (noting that “they were careful not to overstate the case”).

¹¹³ Edwin R.A. Seligman, *The Theory of Progressive Taxation*, 8 POL. SCI. Q. 220, 222 (1893) (arguing that “[i]t is quite possible to repudiate absolutely the socialistic theory of taxation and yet at the same time to advocate progression”); Mehrotra, *Envisioning*, *supra* note 111, at 1849. Like Hale, Seligman stopped short of advocating government planning in pursuit of equal distribution of resources. Seligman, *supra*, at 222 (“From the principle that the state may modify its strict fiscal policy by considerations of general national utility, to the principle that it is the duty of the state to redress all inequalities of fortune among its private citizens, is a long and dangerous step.”); FRIED, *supra* note 103, at 6.

¹¹⁴ See *supra* notes 13–14 and accompanying text.

thought.¹¹⁵ We agree that the progressive potential of the tax system has been impeded by the principle of market-supremacy that the feature article critiques in other areas of public law.¹¹⁶ At the same time, however, tax law stands apart from the public law examples considered by LPE scholars because experts and policymakers have typically justified the modern progressive income tax—one of the central elements of the federal tax system—on explicitly distributional grounds, even within the law and economics analytic frame.¹¹⁷

This Part surveys the state of tax law and scholarship as viewed through the lens of the prevailing norms and assumptions that LPE scholars critique *and* the LPE priorities around which these scholars would reorient. Part IV.A begins by describing the role of economic difference in tax law and scholarship. Tax theory and policy generally embrace the principle that individuals should be treated differently based on economic circumstances.¹¹⁸ This central focus on distribution and economic difference and the widespread and longstanding (though not universal) acceptance of that premise in tax law, policy, and scholarship distinguishes tax from many other legal fields.

Part IV.B then highlights areas of tax scholarship that have long argued for the same reorientations that the feature article prescribes. Critical Tax scholars, in particular, have argued for decades that the basic conceptions of distribution that predominate in tax scholarship fail to account for the structural imbalances the fiscal system reinforces.¹¹⁹ These scholars have argued that tax scholarship under the influence of market-centric norms and assumptions may be particularly harmful in that it purports to focus on economic redistribution while actually obscuring and exacerbating many forms of inequality.¹²⁰ Touchstones of Critical Tax scholarship include a skepticism of neutrality as well as arguments and empirical research supporting more robust notions of equality.¹²¹ These are the same considerations that LPE scholars seek to center in legal scholarship.

¹¹⁵ As discussed above, and as the feature article notes, if a traditional law and economics analysis acknowledges distributional consequences, that analysis typically identifies the tax and transfer system as the most appropriate mechanism for distributional adjustments. Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1798 & n.51 (citing Kaplow & Shavell, *supra* note 46). Through a narrow and stylized efficiency lens, such adjustments are the sole acceptable means to correct for any inequality resulting from the wealth-maximizing reforms that law and economics analysis implies. *Id.* at 1798, 1816. *See also infra* notes 231–40 and accompanying text.

¹¹⁶ *See supra* Part III.C (discussing the early and predominate conclusions from optimal tax literature, which reflect the priorities of the Twentieth Century Synthesis).

¹¹⁷ *See infra* Part IV.C.2.

¹¹⁸ *See infra* Part IV.A.

¹¹⁹ *See infra* Part IV.B.1.

¹²⁰ *See, e.g.,* Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 923 (1997).

¹²¹ *See* Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J.L. & SOC. POL'Y 206, 211 (2014).

Other areas of tax scholarship also intersect with the reorientations that LPE scholars envision. First, works in the tax literature challenge the presumption of an antecedent market to which law is subservient.¹²² These tax scholars would instead orient the state and its laws as antecedent to the market, empowering democratic governments with an expansive obligation to intervene in market distributions.¹²³ Second, an emerging area of tax scholarship considers the implications of inequality and economic power imbalances for tax theory and design.¹²⁴ Third, tax scholarship on “fiscal citizenship” and related concepts has scrutinized tax law based on principles of democratic decision-making and membership in a democratic community.¹²⁵

Part IV.C describes the field of optimal taxation, which is the dominant application of the economic mode of analysis in tax scholarship. Unlike the law and economics analysis that the feature article describes,¹²⁶ the optimal tax literature explicitly allows for distributional and other concerns to be integrated into its economic models. Nonetheless, optimal tax scholarship—both as theorized and as implemented—invites many of the same critiques the feature article poses across legal thought. Recent optimal tax scholarship, however, has moved in a direction that addresses some of the concerns LPE scholars have pointed toward law and economics generally.

This Part also describes how tax scholarship reflects both the influences of economics-oriented legal scholarship and the considerations prioritized by LPE scholars, and often holds these competing considerations in tension. As in other areas of law, much of tax scholarship seeks to convert fundamentally political questions into technical analysis focused on neutrality or efficiency. Such efforts often fail to acknowledge the normative implications behind such work. Nonetheless, a robust body of tax scholarship has confronted the hegemony of the law and economics movement—and its prioritization of neutrality and efficiency—in the same way that LPE would prescribe.¹²⁷ At the same time, the experience of tax scholarship offers examples of the rationale behind properly qualified efficiency analysis, and the potential of principles such as neutrality to beneficially guide policy. By navigating these tensions, works in tax scholarship demonstrate the possibility of the pluralistic approach described above and, as explained further in Part IV, points toward possible future directions for LPE scholarship.

¹²² See *infra* Part IV.B.2.

¹²³ See *infra* Part IV.B.2.

¹²⁴ See *infra* Part IV.B.3.

¹²⁵ See *infra* Part IV.B.4.

¹²⁶ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1798–1800. Other LPE scholarship characterizes law and economic analysis similarly. See, e.g., McCluskey, Pasquale & Taub, *supra* note 6, at 298.

¹²⁷ See *infra* Part IV.A–C.

A. *Progressive Taxation and Economic Difference*

In contrast to the many other areas of law that the LPE project has focused upon, tax laws routinely treat individuals differently based on their economic circumstances. In particular, as elaborated below, progressive taxes—which impose higher relative tax burdens on people with greater resources—explicitly differentiate among taxpayers based on their economic circumstances. Progressivity, in turn, is generally recognized as an essential feature of the U.S. tax system.¹²⁸ Thus, even as law and economics frameworks obscure the role of economic differences in many fields of law, distributional outcomes remain a central priority of the tax system.

One of LPE’s central critiques is that current modes of legal thought tend to sideline the role of economic difference in the law.¹²⁹ In the tax system, in contrast, economic difference serves as a central organizing principle. Tax rules such as progressive income tax rates¹³⁰ and the estate tax¹³¹ intentionally impose different legal outcomes based on a taxpayer’s economic circumstances.

In one respect, this defining role of the tax system reflects a basic view in the law and economics literature: that the tax system should be the only situs for distributional adjustments in the law.¹³² Under this view, redistribution through other legal rules would introduce multiple distortions, which could be reduced through adjustments to the income tax alone.¹³³

The concept of differential taxation based on differential economic circumstances long predates these multiple distortion arguments, however, and is a fundamental premise of progressive taxation. A simple tax that would treat all taxpayers *the same* regardless of their economic circumstances—often referred to as a “head tax”—represents the archetype of an unfair or undesirable tax in tax scholarship and policy discourse.¹³⁴ Similarly, excise taxes, which

¹²⁸ See CONG. BUDGET OFF., THE DISTRIBUTION OF HOUSEHOLD INCOME, 2016, at 9 (July 2019), <https://www.cbo.gov/system/files/2019-07/55413-CBO-distribution-of-household-income-2016.pdf> [<https://perma.cc/9HYT-9RBK>] (showing broadly progressive federal taxes in the United States); Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 417 (1952) (“Progressive taxation is now regarded as one of the central ideas of modern democratic capitalism . . .”); Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 42 (2006) (asserting that distributional fairness in the tax system “requires a progressive tax system”).

¹²⁹ See *supra* notes 35–37 and accompanying text.

¹³⁰ I.R.C. § 1(a)–(d), (j).

¹³¹ I.R.C. §§ 2001–2210.

¹³² See *supra* note 46 and accompanying text.

¹³³ See, e.g., Kaplow & Shavell, *supra* note 46, at 667–69.

¹³⁴ MICHAEL J. GRAETZ, DEBORAH H. SCHENK & ANNE L. ALSTOTT, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 37 (8th ed. 2018) (“A head tax is manifestly unfair . . . because it ignores people’s different abilities to pay, and such a tax has never seriously been proposed in the United States.”). In the United Kingdom, Prime Minister Margaret Thatcher famously attempted to replace local taxes based on property values with

were the U.S. federal government's primary source of tax revenue for more than a century before the Sixteenth Amendment enabled a permanent income tax, were widely criticized as regressive and unable to account for taxpayers' economic differences.¹³⁵

Progressive income taxation has been a central and consistent feature of the federal tax system since the ratification of the Sixteenth Amendment in 1913.¹³⁶ Thus, for more than a century federal taxation has been premised on an explicit recognition that taxpayers should be treated differently based on their economic circumstances.¹³⁷ Leading reform proposals from varying ideological perspectives almost invariably embrace at least some degree of progressivity.¹³⁸ Although proposals may differ—for example, looking to differences in personal consumption or accrued wealth—they largely tend to recognize that those with more should pay more.¹³⁹ Proposals to reform the current income tax most often contest the degree of progressivity and best ways to operationalize the broadly shared commitment to progressive taxation.¹⁴⁰

a head tax (officially titled a “Community Charge” and commonly referred to as a “poll tax”) at a flat rate for each person. The results were politically catastrophic, with protests and riots breaking out in the streets and contributing to Thatcher's resignation shortly thereafter. Her successor repealed the poll tax the following year. *See* Alan Travis, ‘*Unfair, Uncollectable*’: *How Major Told Thatcher He Was Ditching Poll Tax*, *GUARDIAN* (July 19, 2017), <https://www.theguardian.com/politics/2017/jul/20/unfair-uncollectable-how-major-told-thatcher-ditching-poll-tax> [<https://perma.cc/E7JS-3MR5>]; Nick Higham, *National Archives: Thatcher's Poll Tax Miscalculation*, *BBC NEWS* (Dec. 30, 2016), <https://www.bbc.com/news/uk-38382416> [<https://perma.cc/UU8W-4X42>].

¹³⁵ *See, e.g.*, Mehrotra, *Envisioning*, *supra* note 111, at 1803, 1826–27 (discussing the transition from the ‘Old Fiscal Order,’ informed in part by Judge Cooley's comments regarding the regressivity of excise taxes).

¹³⁶ *See* TAX FOUND., *FEDERAL INDIVIDUAL INCOME TAX RATES HISTORY*, https://files.taxfoundation.org/legacy/docs/fed_individual_rate_history_nominal.pdf [<https://perma.cc/L3DA-9GPV>] (showing progressive income tax rates from 1913–2013).

¹³⁷ In the decades immediately preceding the modern progressive income tax, economist E.R.A. Seligman developed the case for progressivity by tracing its origins in premodern tax systems, describing its theoretical justifications, and considering how it could be incorporated into the U.S. tax system. *See generally* Edwin R.A. Seligman, *Progressive Taxation in Theory and Practice*, reprinted in 9 *AM. ECON. ASS'N. Q.* 563 (1908).

¹³⁸ Consider, as one example, the “Better Way” tax plan proposed by Republican congressmen Paul Ryan and Kevin Brady. John C. Goodman, *The Better Way Tax Plan*, *FORBES* (Aug. 10, 2017), <https://www.forbes.com/sites/johngoodman/2017/08/10/the-better-way-tax-plan/> [<https://perma.cc/G4XE-GENC>]. The plan's proponents touted its progressivity alongside business incentives and efficiency benefits. *Id.*

¹³⁹ *See, e.g., id.*

¹⁴⁰ *E.g.*, DAVID F. BRADFORD, *UNTANGLING THE INCOME TAX* 320–29 (1986) (proposing as one direction for tax reform a value added tax with a reduction in payroll taxes on low earners to yield a progressive rate on household wage income). The commitment to progressive taxation is certainly not universal, but is reflected in tax reform proposals from both Democratic and Republican policymakers. *See, e.g.*, SENATE FIN. COMM. DEMOCRATS, *TREAT WEALTH LIKE WAGES* 4, 7–9 (2019), <https://www.finance.senate.gov/imo/media/doc/Treat%20Wealth%20Like%20Wages%20RM%20Wyden.pdf> [<https://perma.cc/CBU9-GDAF>]

Scholars, experts, and policymakers justify progressive taxation and its accounting for economic difference through different normative frameworks. A traditional utilitarian or welfarist frame justifies progressive taxation on the principle of declining marginal utility: an additional dollar of income yields less additional utility to a higher income person than to a lower income person.¹⁴¹ From this perspective, a progressive tax system increases aggregate utility—relative to that under a proportionate or regressive tax—by taxing higher income taxpayers at higher proportional rates.¹⁴² Because each dollar is worth relatively less to the higher income taxpayers, these taxpayers can bear these higher proportionate tax burdens at a lower utility cost. That is, they experience less of a utility loss than would a lower-income taxpayer paying the same amount of tax.¹⁴³

Optimal tax analysis—the leading contemporary economic framework for analyzing tax policy—incorporates this reasoning in the analysis of tax systems. As described in Part IV.C. below, optimal tax models utilize methods from welfare economics, “the branch of economic theory concerned with the social desirability of alternative economic states.”¹⁴⁴ Welfare economists generally prioritize maximizing the welfare, or wellbeing, of individuals in society.¹⁴⁵ Although welfare is ostensibly the object, welfare economics models often rely on the outcomes of economic activity as a critical factor in welfare.¹⁴⁶ This focus on economic outcomes and growth explains why LPE scholars critique law and economics as unduly fixated on a criterion of wealth maximization.¹⁴⁷ Yet,

(proposing to increase progressivity through annual taxation of capital gains under the rate schedule for ordinary income); PRESIDENT’S ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA’S TAX SYSTEM, at xiii–iv (Nov. 2005), <https://govinfo.library.unt.edu/taxreformpanel/final-report/index.html> [<https://perma.cc/G2CJ-DW7W>] (offering two alternative tax reform proposals, each intended to “retain[] the progressive nature of our current tax system”).

¹⁴¹ See Blum & Kalven, *supra* note 128, at 455–61; Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 910–19 (2011) (describing the traditional assumption of declining marginal utility and its implications). Lawsky argues, however, that this principle is itself a normative judgment that is not necessarily consistent with empirical evidence. *Id.* at 919–51.

¹⁴² Blum & Kalven, *supra* note 128, at 419–20 (explaining that in a progressive tax the effective rates—and not just absolute tax liabilities—increase with income).

¹⁴³ Lawsky, *supra* note 141, at 915–19.

¹⁴⁴ HARVEY S. ROSEN & TED GAYER, PUBLIC FINANCE 34 (9th ed. 2010).

¹⁴⁵ See JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 45–56 (5th ed. 2016).

¹⁴⁶ See *id.*

¹⁴⁷ See Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1796–97. The feature article authors admit that rather than prescribing to wealth maximization some “leading law-and-economics scholars instead retreated—in theory—to the criterion of welfare maximization.” *Id.* at 1797 n.46 (citing Richard Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163, 166 (1990)). In welfare economics, which is the prevailing modern application of neoclassical methods of economic analysis, economic outcomes are typically used as a proxy for welfare. *Id.* at 1796 n.43 (citing RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 60 (1981)) (providing an economic analysis of law and arguing that

unlike other areas of law and economics, optimal tax's focus on welfare combined with an assumption of diminishing marginal utility of income *require* treating people differently based on their economic circumstances.¹⁴⁸ Thus, even economics-based frameworks in tax reflect a central concern for economic difference.

The utilitarian concept of the declining marginal utility of income or consumption—and thus the importance of economic difference in tax design—underlies the leading frameworks for distributive justice that animate much of tax scholarship and policy.¹⁴⁹ These varying ideological and theoretical perspectives—originating in different normative commitments—share a common assumption that economic difference is a meaningful distinction in designing and evaluating tax policies. For this reason, tax scholarship cannot focus exclusively on efficiency or wealth maximization to the neglect of distribution.

Progressive taxation's widespread support offers one explanation for tax scholarship's central concern with distribution. The following Part describes additional perspectives in tax scholarship that account for LPE priorities.

B. How Tax Scholarship Accounts for LPE Priorities

Beyond these theories of progressivity, tax scholarship reflects a range of frames for understanding the tax system and both alternatives and extensions to the efficiency-oriented perspective that has come to dominate much legal thought. This Part describes these areas of tax scholarship, and how they account for the same priorities for orienting legal thought advanced by the LPE framework. Part IV.B.1 first describes how Critical Tax scholars have emphasized the three major points that the framework urges scholars to center in legal thought—power, equality, and democracy. Parts IV.B.2 through IV.B.4 then describe additional areas of tax scholarship exploring how the tax system can account for the priorities identified in LPE scholarship.

the logic of law is an economic one, as judges seek to maximize economic welfare or achieve the greatest “total consumer and producer surplus generated by those goods and services’ in the economy”). Thus, maximizing wealth in law and economics models is understood to represent maximizing human welfare.

¹⁴⁸ See *infra* Part IV.C (discussing optimal tax models).

¹⁴⁹ For example, variations of the basic concept of taxation by ability to pay have been defended by thinkers ranging from John Stuart Mill to John Rawls, and are also reflected in U.S. popular opinion. See JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 804 (W.J. Ashley ed., new ed. 1909) (discussing the concept of equal sacrifice); JOHN RAWLS, A THEORY OF JUSTICE 62–67 (1971) (advocating redistribution to the least well-off from a liberal egalitarian, rather than utilitarian, perspective); STEVEN M. SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE 118–60 (2013) (describing the range of public opinions on the redistributive function of progressive taxation).

1. *Critical Tax*

Perhaps the most direct challenges to efficiency-oriented tax scholarship come from the tax-oriented subfield of Critical Legal Theory, known as “Critical Tax.”¹⁵⁰ Now in its third decade as a distinct subfield, Critical Tax seeks to reorient tax scholarship in ways that LPE recommends. Works in Critical Tax generally tend to reject efficiency as a singular priority in tax, emphasize equality rather than an oversimplified account of neutrality, and elevate democratic tax policy decisionmaking through its attention to anti-subordination.¹⁵¹ Rooted in skepticism of market outcomes as presumptively just, Critical Tax both documents and critiques the ways tax policy unjustly impacts taxpayers who are BIPOC,¹⁵² women,¹⁵³ undocumented,¹⁵⁴ LGBTQIA,¹⁵⁵ or people with disabilities.¹⁵⁶ It uncovers how the various axes

¹⁵⁰ The name references the Critical Legal Theory movement that interrogated the Synthesis in fields of law outside of tax. *See supra* note 64 and accompanying text. Prior to the establishment of the “Critical Tax” subfield, earlier works in Critical Legal Theory considered the role of the tax law in the context of broader critiques of the legal system. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 101–02 (1987) (evaluating the medical expense deduction in the context of a broader exploration of the tension between intentionalism and determinism in legal thought). The Critical Tax Movement initially launched at a series of conferences in the mid-1990s. Karen B. Brown, Mary Louise Fellows & Bridget J. Crawford, *The Past, Present, and Future of Critical Tax Theory: A Conversation*, 10 PITT. TAX REV. 59, 59–62 (2012). The papers from these conferences were subsequently anthologized. *See generally* TAXING AMERICA (Karen B. Brown & Mary Louise Fellows eds., 1996); CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009). This field of tax scholarship continues to challenge the dominant modes of tax analysis and to expose the structural biases shaping tax policy and thought. *See, e.g.*, DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT 3–13 (2021).

¹⁵¹ *See, e.g.*, Brown, Fellows & Crawford *supra* note 150, at 60–61; Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 752–53.

¹⁵² *See, e.g.*, Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 787–88 (1997); Moran & Whitford, *supra* note 151, at 751; Leo P. Martinez, *Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration*, 20 HARV. LATINX L. REV. 101, 115 (2017).

¹⁵³ *See, e.g.*, Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 493.

¹⁵⁴ *See, e.g.*, Francine J. Lipman, *The “ILLEGAL” Tax*, 11 CONN. PUB. INT. L.J. 93, 95–96 (2011).

¹⁵⁵ *See, e.g.*, Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97, 98–99 (1991); Katherine Pratt, *The Curious State of Tax Deductions for Fertility Treatment Costs*, 28 S. CAL. REV. L. & SOC. JUST. 261, 262–70 (2019); Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 767–69 (2004).

¹⁵⁶ Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PENN. L. REV. 1053, 1057 (2006); Francine J. Lipman, *Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized*

of subordination that operate in areas outside of tax policy are reinforced not only by how tax laws are written and administered, but also by scholars who allege the neutrality of such laws.¹⁵⁷ Critical Tax also flips the traditional concern with how a particular tax allegedly distorts market participation to a concern with how markets distort societal goals of human dignity and equality of opportunity.¹⁵⁸

Critical Tax scholars typically identify a constituency of taxpayers known to be marginalized in other areas of political and economic life, and then assess the extent to which our tax laws entrench this subordination.¹⁵⁹ For some examples, scholars including Professor Bridget Crawford have argued that the taxation of menstrual products undermines freedom from discrimination and the right to health for people who menstruate¹⁶⁰ and Professors Beverly Moran, Dorothy Brown and others argue that many prominent features of the tax system “systematically favor whites over blacks.”¹⁶¹ This focus on power relationships similarly accords with the LPE framework’s call to reorient legal scholarship’s focus from efficiency to considering relationships of power.

Critical Tax scholarship’s skepticism of neutrality also parallels the LPE framework. Critical Tax scholarship questions the role of neutrality as either an accurate description for the operation of our tax system or as a privileged standard for evaluating tax laws.¹⁶² Many Critical Tax scholars consider neutrality as a deleterious and misleading objective that not only masks actual inequalities but also prevents their remedy.¹⁶³ Critical Tax Scholars thus are skeptical of neutrality as a goal, given the longstanding inequities that redistribution through the tax system could directly redress.¹⁶⁴ As Professor Jeremy Bearer-Friend has documented, the very data collected and analyzed by our federal tax research institutions promote the illusion of neutrality in our tax

Tax Incentives, 53 AM. U. L. REV. 393, 403–04 (2003); ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 120–21 (2018).

¹⁵⁷ While some scholars personally identify as “Crits,” others write scholarship that builds from and furthers the Critical Tax Movement without adopting the label. For example, calls for papers to the annual Critical Tax Conference are not limited to scholars who identify as “tax crits.”

¹⁵⁸ See TAXING AMERICA, *supra* note 150, at 3–5.

¹⁵⁹ See, e.g., Brown, *supra* note 152, at 787–88; Lipman, *supra* note 154, at 95–96; Cain, *supra* note 155, at 98–99; Seto & Buhai, *supra* note 156, at 1057–58.

¹⁶⁰ See Crawford & Spivack, *supra* note 153, at 513–18.

¹⁶¹ See Moran & Whitford, *supra* note 151, at 753; see also BROWN, *supra* note 150, at 10–11.

¹⁶² See Moran & Whitford, *supra* note 151, at 752; INFANTI, *supra* note 156, at 127–28.

¹⁶³ See generally Buchanan, *supra* note 89 (describing how a facially neutral efficiency analysis can obscure the role of normative biases and inequality of baseline entitlements).

¹⁶⁴ See, e.g., ANDRE L. SMITH, TAX LAW AND RACIAL ECONOMIC JUSTICE: BLACK TAX, at xi (2015) (“[N]eutral rules and principles alone do not necessarily produce equal opportunity.”).

laws.¹⁶⁵ This work, like the LPE framework, suggests reorientation from neutrality to equality.

Critical Tax also emphasizes the potential of democratic decisionmaking and the need for conscientious regulation of economic activity, rather than deference to market outcomes. For example, more than three decades ago, Professor Marjorie Kornhauser argued that neoliberal opposition to progressive taxation obscured shared community interests and thus muddled democratic debates on tax policy.¹⁶⁶ Professor Nancy Staudt similarly argues that mainstream tax theory has disregarded connections between tax policy and political empowerment.¹⁶⁷ In particular, she writes, it has overlooked how tax policies might enable poor people to fulfill democratic social obligations that many associate with tax paying.¹⁶⁸ The LPE framework would prioritize these same values of democratic decisionmaking and governance that have long featured in Critical Tax scholarship.

2. *The Private Market as a Public Creation*

As described above,¹⁶⁹ the assumption that situates markets as antecedent to state intervention underlies much of the prevailing efficiency-centered approach to legal thought. This approach enshrines a principle of market supremacy and a corollary principle of government subordination.¹⁷⁰ The feature article argues that this approach prioritizes a narrow conceptualization of “neutrality” in legal thought and shields the economic order from meaningful democratic restraints or policy intervention.¹⁷¹ The LPE framework would reorient this framing by viewing market arrangements as the contingent outcomes of antecedent political choices.¹⁷²

¹⁶⁵ Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 38–39 (2019).

¹⁶⁶ Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 465–66, 504–05, 509, 511–12 (1987) (identifying holistic analysis of humanities interrelatedness as “the feminist vision,” in contrast with the male perspective that focuses on individualism and self-interest, and arguing that the latter overwhelmed the former in mid-1980s democratic debates on federal tax policy).

¹⁶⁷ Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 922–23 (1997).

¹⁶⁸ *Id.* at 924–25.

¹⁶⁹ See *supra* notes 33–36 and accompanying text.

¹⁷⁰ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1797 (“Elevating efficiency as a value also marginalized questions of distribution, so that the law of economic exchange was itself ‘encased,’ protected from distributive or other political demands beyond the demand for efficiency itself.” (citing SLOBODIAN, *supra* note 45, at 5–7, 13)).

¹⁷¹ *Id.* at 1827 (“The versions of legal neutrality that we have been criticizing—wealth maximization and other forms of efficiency analysis in ‘economic’ law and formal (structurally indifferent) equality and liberty in ‘public’ law—erect barriers to political judgments about economic order.”).

¹⁷² *Id.* at 1821.

Works in tax scholarship also critique the assumption of market outcomes as antecedent to government intervention, as well as the view that taxes or other government policies disrupt this presumptively neutral ordering.¹⁷³ One especially prominent work is Liam Murphy and Thomas Nagel’s *The Myth of Ownership*. Similar to the LPE framework, Professors Murphy and Nagel position the state as antecedent to the market in the context of property entitlements and taxation.¹⁷⁴ As they explain, the presumption of market supremacy over government intervention pervades not just efficiency-based frameworks, but traditional conceptualizations of fairness and equity as well.¹⁷⁵ For instance, the tax distribution principle of “equal sacrifice” evaluates fiscal policies’ distributional outcomes based on comparison to a hypothetical pre-tax baseline of market outcomes.¹⁷⁶ In doing so, however, these frameworks presume the neutrality of the pre-tax income distribution. Professors Murphy and Nagel label this specific form of market supremacy “everyday libertarianism.”¹⁷⁷ They argue that “[p]rivate property is a legal convention, defined in part by the tax system; therefore, the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity.”¹⁷⁸

Murphy and Nagel’s thesis—which directly responds to the assumption of an antecedent market—has profoundly impacted tax scholarship.¹⁷⁹ Their repositioning of the market as a product of policy redefined how scholars wield traditional equity frameworks.¹⁸⁰ The work most directly influenced articles arguing or presuming that the state is antecedent to the market.¹⁸¹ Others cite

¹⁷³ See LAURIE L. MALMAN, LINDA F. SUGIN & CLINTON G. WALLACE, *THE INDIVIDUAL TAX BASE: CASES, PROBLEMS, AND POLICIES IN FEDERAL TAXATION* 15–21 (2019) (defining efficiency and neutrality as typically used in tax policy analysis).

¹⁷⁴ LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 8 (2002).

¹⁷⁵ *Id.* at 31.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 8.

¹⁷⁹ See Neil H. Buchanan, *The Law of Taxation Is the Lynchpin of Civilization*, JOTWELL (June 26, 2019), <https://tax.jotwell.com/the-law-of-taxation-is-the-lynchpin-of-civilization/> [<https://perma.cc/YE22-ZBM3>] (describing *The Myth of Ownership* as “classic”); *Research Canons: Tax*, PRAWFSBLAWG (Oct. 24, 2006), https://prawfsblawg.blogs.com/prawfsblawg/2006/10/research_canons_17.html [<https://perma.cc/7JHH-RHRB>] (including *The Myth of Ownership* on a list of “tax canons”).

¹⁸⁰ For work responding to Professors Murphy and Nagel’s critiques of traditional equity analysis, see, for example, James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 FLA. TAX REV. 135, 141–42 (2012), and Ira K. Lindsay, *Tax Fairness by Convention: A Defense of Horizontal Equity*, 19 FLA. TAX REV. 79, 83 (2016).

¹⁸¹ Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 831 n.52 (2005) (citing Murphy and Nagel for “the argument that the tax system is actually helping to set an appropriate *initial* normative baseline for ownership or command over material resources”); Marjorie E. Kornhauser, *Choosing a Tax Rate Structure in the Face of Disagreement*, 52 UCLA L. REV. 1697, 1709 (2005) (citing MURPHY & NAGEL *supra* note

The Myth of Ownership almost pro forma, as if tax scholars are required to acknowledge that ownership is a legal convention so that they can move on from that point.¹⁸² The dominance of Murphy and Nagel's framework in tax scholarship reflects tax scholars' longstanding awareness of the normative choices behind the presumption of market supremacy. Their work also demonstrates the enduring presence of threads in tax scholarship challenging the basic premise of neutrality.

3. *Economic Power*

Tax scholarship has necessarily reflected a concern with economic power, because of progressive taxation's general concern with economic difference described above. Many tax scholars have centered considerations of economic power—and the dangers from its concentration—in the analysis of tax policy and design, consistent with the LPE framework's proposed reorientation from efficiency to power.

Works in tax scholarship have focused on the role of economic power across different areas of tax law as well as its implications for the assessment of different tax instruments. Professor Ajay Mehrotra's research on the tax treatment of corporate mergers and acquisitions, for example, uncovered the role of economic power in transforming a "limited statutory exception into a modern version of voluntary corporate welfare."¹⁸³ This research thus shows

174, at 8, to support the proposition that "government plays a role . . . in the creation of all wealth and income because all private property is 'a legal convention'"); Conor Clarke & Edward Fox, *Perceptions of Taxing and Spending: A Survey Experiment*, 124 YALE L.J. 1252, 1280 (2015) (noting that "one's pre-tax income depends crucially on a system of public order that could not exist without government intervention (and, hence, taxation)"); see also Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1900 (2005) (comparing enforcement of refundable tax credits to welfare benefits, attributing less stringent enforcement of tax credits to "everyday libertarianism").

¹⁸² Lawrence Zelenak, *Mitt Romney, the 47% Percent, and the Future of the Mass Income Tax*, 67 TAX L. REV. 471, 489 (2014) (citing Murphy and Nagel for a book-length argument that the post-tax and transfer distribution of economic wellbeing is the important focal point); Michael Doran, *Intergenerational Equity in Fiscal Policy Reform*, 61 TAX L. REV. 241, 262 (2008) (citing Murphy and Nagel to support the position that "questions about the fair distribution of wealth require consideration of actual outcomes"); John R. Brooks II, *Fiscal Federalism as Risk-Sharing: The Insurance Role of Redistributive Taxation*, 68 TAX L. REV. 89, 94 n.22 (2014) (caveating his main point to note that comparing outcomes to pre-tax income is problematic, citing to Murphy and Nagel); Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1747 n.6 (2005) (noting, as a caveat to his main point, that "[i]t is compelling to consider that tax or other 'redistributive' programs are better understood as setting the normatively appropriate initial distribution of material resources, as opposed to their redistribution").

¹⁸³ Ajay K. Mehrotra, *Mergers, Taxes, and Historical Materialism*, 83 IND. L.J. 881, 881 (2008).

not only how economic power influences tax policy, but also how tax policy then helps to preserve that power.

This line of tax scholarship also connects tax policy with the resurgent concerns over corporate monopolies in contemporary legal scholarship.¹⁸⁴ Professor Reuven Avi-Yonah similarly argues that the separate entity-level tax on corporations can restrict corporate economic power by enabling the government to incentivize desirable corporate behavior and by limiting accumulations of concentrated corporate power.¹⁸⁵ In a more recent work with Lior Frank, he argues that a progressive corporate tax can also serve as an alternative to anti-trust regulation as a means to limit monopolistic rent-seeking by large corporations.¹⁸⁶

Professor Ari Glogower considers how differences in economic power can inform the choice and definition of the individual tax base.¹⁸⁷ He argues that the distribution of tax burdens in a progressive tax system requires a predicate normative choice of how to measure and define economic difference, as well as the measure of inequality that the tax system should mitigate.¹⁸⁸ Just as an optimal tax analysis cannot definitively answer the normative question of how *much* the tax system should ameliorate inequality, it also cannot answer the similarly normative question of how inequality should be defined and measured for these purposes.¹⁸⁹

Glogower argues that this choice of how inequality should be defined and mitigated, in turn, has consequences for the definition of the progressive tax base. The progressive tax base measures relative economic difference, which in turn informs how tax burdens should be shared.¹⁹⁰ In this case, he argues, the definition of the progressive tax base depends in part upon the assumptions as to how inequality should be defined, measured, and mitigated.¹⁹¹ From a perspective concerned with economic outcomes, for example, the tax system

¹⁸⁴ JEREMY BEARER-FRIEND, *THE GREAT DEMOCRACY INITIATIVE, RESTORING DEMOCRACY THROUGH TAX POLICY* 13–14 (Dec. 2018) (calling for an end to tax-free reorganizations because they subsidize mergers). *See generally* Yariv Brauner, *A Good Old Habit, or Just an Old One? Preferential Tax Treatment for Reorganizations*, 2004 *BYU L. REV.* 1.

¹⁸⁵ *See* Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 *VA. L. REV.* 1193, 1238–49 (2004).

¹⁸⁶ Reuven S. Avi-Yonah & Lior Frank, *Antitrust and the Corporate Tax: Why We Need Progressive Corporate Tax Rates*, 167 *TAX NOTES FED.* 1199, 1201–03 (2020); *see also* Edward Fox & Zachary Liscow, *A Case for Higher Corporate Tax Rates*, 98 *TAX NOTES INT'L* 1369, 1376–79 (2020).

¹⁸⁷ Ari Glogower, *Taxing Inequality*, 93 *N.Y.U. L. REV.* 1421, 1461 (2018).

¹⁸⁸ *Id.* at 1428, 1445–49.

¹⁸⁹ Ari Glogower, *Comparing Capital Income and Wealth Taxes*, 48 *PEPPERDINE L. REV.* 875, 875–76, 881, 909 (2021).

¹⁹⁰ Glogower refers to this function of the progressive tax base as the “comparing” function. *Id.* at 906–08; Glogower, *supra* note 187, at 1461–63.

¹⁹¹ Glogower, *supra* note 189, at 876, 881.

might seek to ameliorate differences in relative economic power.¹⁹² This perspective could imply comparing taxpayers based on their relative spending power during the taxing period through a tax base that accounts for both income *and* wealth.¹⁹³ Doing so would center economic power in the definition of the tax base. It would also focus the tax system on ameliorating differences in economic power in particular, rather than differences in other measures such as welfare or consumption.

Finally, tax scholars have argued that the tax system should not only account for economic difference when imposing tax burdens on the wealthy, but also can build wealth for taxpayers with less economic power. For example, Professor Goldburn Maynard argues that progressive taxes, such as a tax on wealth, can be used to achieve both of these objectives by raising revenue that can be used to “level up” lower-income taxpayers.¹⁹⁴

4. Fiscal Citizenship and Democracy

Tax scholars have also focused on the role of the tax system in fiscal citizenship and democratic participation. This work accords with the final LPE reorientation described in the feature article “from antipolitics to democracy.”¹⁹⁵ The framework explores how the market-centric legal thought has worked to establish “artificial barriers between political and economic ordering.”¹⁹⁶ Tax law and policy, in contrast, have never maintained an illusion of separation between the two.¹⁹⁷ Taxation sits at the nexus of politics and the economy: Tax policy is a product of politics as well as a key government intervention for producing and maintaining the economic order.¹⁹⁸

Taxation reaches into the private economic life of every person and household; tax revenues sustain and enable all public spending.¹⁹⁹ Perhaps for these reasons, one of the leading early pieces of scholarship exploring the tradeoffs between progressivity and efficiency described the progressive income tax as “perhaps the cardinal instance of the democratic community struggling

¹⁹² *Id.*

¹⁹³ Glogower, *supra* note 187, at 1472–76; Glogower, *supra* note 189, at 887, 906–08.

¹⁹⁴ See generally Goldburn P. Maynard Jr., *Addressing Wealth Disparities: Reimagining Wealth Taxation as a Tool for Building Wealth*, 92 DENV. U. L. REV. 145 (2014).

¹⁹⁵ Britton-Purdy, Grewal, Kapczynski & Rahman., *supra* note 8, at 1827–32; see also *supra* notes 83–86 and accompanying text.

¹⁹⁶ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1827.

¹⁹⁷ *Id.*

¹⁹⁸ One of the most powerful illustrations of this aspect of tax policy is the role taxes have played in entrenching racial inequality in the United States. See generally WALSH, *supra* note 14; ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006).

¹⁹⁹ But see Brian Galle & Yair Listokin, *Monetary Finance* (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885966 (on file with authors) (describing the limited conditions under which printing money is a viable alternative to taxation for financing the public sector). The manuscript also provides a summary of the claims made by the burgeoning field of Modern Monetary Theory.

with its hardest problem.”²⁰⁰ In a comparative study of taxation in four modern democracies, Sven Steinmo similarly observes 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.”²⁰¹

A growing literature focuses on the connections and potential connections between tax and democratic governance. Professor Linda Sugin introduces the concept of “democratic fairness,” which “encompasses democratic values that are not reducible to dollars,” and describes its implications for the tax system.²⁰² Professor Tsilly Dagan notes the limits of efficiency and equity in evaluating tax policy by surfacing considerations of community and identity.²⁰³ Professor James Repetti contends that the social and political harms from wealth concentration justify a tax system explicitly designed to reduce economic inequality and thereby promote “self-realization” and opportunity.²⁰⁴ He argues that this consideration may independently justify instruments such as a tax on wealth transfers (for instance, through the estate or gift tax).²⁰⁵

Other tax scholars contend that the connection between taxation and democracy is mutually reinforcing.²⁰⁶ Taxation is central to how the members of a democratic state experience their participation in the democratic community.²⁰⁷ For many people in the United States, paying taxes is their only direct interaction with the federal government each year.²⁰⁸ Tax policy also plays a role in how we delineate—in popular understanding, and legally—who is included in the democratic community as citizens.²⁰⁹ Tax rules have the

²⁰⁰ Blum & Kalven, *supra* note 128, at 520.

²⁰¹ SVEN STEINMO, *TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE* 1 (1993).

²⁰² Linda Sugin, *Invisible Taxpayers*, 69 *TAX L. REV.* 617, 651 (2016).

²⁰³ See generally Tsilly Dagan, *Commuting*, 26 *VA. TAX REV.* 185 (2006) (using the example of deductions for commuting expenses to demonstrate tax policy implications for membership in political community).

²⁰⁴ James R. Repetti, *Democracy, Taxes, and Wealth*, 76 *N.Y.U. L. REV.* 825, 826–27 (2001) [hereinafter Repetti, *Democracy, Taxes, and Wealth*]; James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 *VAND. L. REV.* 1129, 1131 (2008) [hereinafter Repetti, *New Paradigm*].

²⁰⁵ Repetti, *Democracy, Taxes and Wealth*, *supra* note 204, at 851–73. Repetti argues, however, that the goal of promoting self-realization by reducing inequality does not necessarily demand the choice of any particular tax base. Repetti, *New Paradigm*, *supra* note 204, at 1153.

²⁰⁶ See, e.g., Clinton G. Wallace, *Tax Policy and Our Democracy*, 118 *MICH. L. REV.* 1233 (2020) (reviewing WALSH, *supra* note 14, and describing some of the effects of the racialized history of the term taxpayer).

²⁰⁷ *Id.* at 1239.

²⁰⁸ See VANESSA S. WILLIAMSON, *READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES* 3 (2017); LAWRENCE ZELENAK, *LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX* 17 (2013).

²⁰⁹ See Nancy C. Staudt, *Taxation Without Representation*, 55 *TAX L. REV.* 555, 556 (2002) (describing and critiquing laws “linking taxpayer status to political participation” and

power to affect individuals in ways that are fundamental to their functioning as part of the democratic polity.²¹⁰ They also affect the structure and efficacy of a wide variety of political and advocacy associations that shape democratic governance.²¹¹ Taxes can expand the political community and ensure the full benefits of citizenship.²¹² Because taxes can directly threaten the political advantages of wealthy elites, efforts to prevent taxation often align with efforts to dismantle democratic accountability.²¹³

Tax policies may especially influence democratic engagement at the state and local level, where voters and policymakers are more closely connected to one another as well as to the sources and uses of tax revenues. In a recent article, Professor Ariel Jurow Kleiman has explored the connections between local democratic decision-making and state-imposed tax limiting laws.²¹⁴ She argues that, by controlling the purse strings, tax limits often prevent local governments from enacting democratically responsive public policies.²¹⁵ The far-reaching influence of the market-centric frame manifests here as well. Jurow Kleiman observes that most work on tax limits has focused too narrowly on economic and fiscal outcomes, while ignoring the governance-related effects of the laws.²¹⁶ Her work builds on other scholarship that considers how tax policies can erode or enhance trust in government and public engagement, by importing these insights to the context of state and local taxation.²¹⁷

political rights); Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 169 (2016) (questioning the link between political representation and duty to pay tax).

²¹⁰ See Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 387 (1998) (“[T]he tax system also can be used to gauge preferences in a way that substitutes for, or even improves upon, a function normally performed by the ballot box or by privately organized surveys.”).

²¹¹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 574 (1983) (regarding the tax-exemption of organizations that discriminate on the basis of race).

²¹² Jeremy Bearer-Friend & Vanessa Williamson, *Tax-Time Voter Registration*, 97 TAX NOTES STATE 615, 617 (2020) (proposing a variety of options for adding a voter registration question to state or federal income tax forms). Tax policy can also be used to undermine universal suffrage through such instruments as poll taxes. See, e.g., J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 35 (1999).

²¹³ Historian Robin Einhorn identifies this pattern in the revenue systems of the Early Republic. Where Southern plantation owners feared taxes could be used to interfere with their ownership of Black people, democracy itself became a threat. Meanwhile, in Northern states, more robust democratic institutions coincided with more robust state revenue systems. See Robin L. Einhorn, *Liberty, Democracy, and Capacity: Lessons from the Early American Tax Regimes*, in *THE NEW FISCAL SOCIOLOGY* 155, 155–79 (Isaac William Martin, Ajay K. Mehrotra & Monica Prasad eds., 2009); EINHORN, *supra* note 198, at 7.

²¹⁴ See generally Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884 (2020) (exploring how tax limits can increase or decrease local public democratic control and public engagement, as well as evaluating possible governance reforms).

²¹⁵ *Id.* at 1900–05.

²¹⁶ *Id.* at 1897–99.

²¹⁷ Cf. SHEFFRIN, *supra* note 149.

C. Optimal Tax Analysis

The tax scholarship described above has evolved in dialogue with the leading subfield of welfare economics²¹⁸ focused on tax policy known as optimal tax theory. This Part begins by explaining the basic reasoning underlying optimal tax theory. It also explores how this theory has historically reflected market-centric premises and has been used to justify lower tax rates, particularly on investments.

In contrast to other efficiency-based frames in legal analysis, however, optimal tax analysis centers questions of distribution and fairness, at least in principle if not always in practice.²¹⁹ Further, unlike the often reductive and stylized law and economics models the feature article critiques, optimal tax models are increasingly empirically grounded.²²⁰ As a result, these optimal tax results have increasing relevance to real-world tax policy debates.

Scholars working in the optimal tax framework also have been in dialogue with other perspectives in tax scholarship.²²¹ Thus optimal tax scholarship is not exclusively a bastion of market-centric policy prescriptions.²²² Rather, optimal tax scholarship is widely recognized to justify progressive taxation of labor

²¹⁸ Welfare economics is introduced and described *supra* notes 142–47 and accompanying text.

²¹⁹ See N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSPS. 147, 150 (2009) (describing optimal tax analysis that uses a nonlinear utility function, which reflects a social planner that prefers a more equal distribution of income); Anthony B. Atkinson & Joseph Stiglitz, *The Design of Tax Structure: Direct Versus Indirect Taxation*, 6 J. PUB. ECON. 55, 55 (1976) (stating “that any treatment of the choice of tax structures must be centrally concerned with distributional considerations”); Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 CORNELL L. REV. 523, 526 (2013) (“While the general law and economics analysis typically focuses on efficiency alone, any plausible theory of an optimal tax and transfer system must address redistribution.”).

²²⁰ Thomas Piketty & Emmanuel Saez, *Optimal Labor Income Taxation*, in 5 HANDBOOK OF PUBLIC ECONOMICS 391, 392 (A.J. Auerbach, R. Chetty, M. Feldstein & E. Saez eds., 2013).

²²¹ E.g., Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 646, 647–57 (1993) (applying an optimal tax framework to justify redistributive tax policies to correct gender-based pay inequities, and observing that “in the real, imperfect world” efficiency analysis “is not necessarily determinate: we can make different efficiency arguments for opposing outcomes in a range of cases”); Chris William Sanchirico, *A Critical Look at the Economic Argument for Taxing Only Labor Income*, 63 TAX L. REV. 867, 908–10 (2010) (questioning various assumptions made by Bankman and Weisbach in their optimal tax models wielded in support of a consumption tax base).

²²² Indeed, as this Part seeks to illustrate, optimal tax literature as a whole is not properly characterized as elevating “profits and managerial power over democratically determined social guarantees.” Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1789 n.21 (citing David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 2–3 (2014)).

income (although not necessarily capital income).²²³ Leading optimal tax scholars have used the methodology to support other progressive and even radically redistributive policies, including high taxes on capital income or wealth.²²⁴

1. *The Origins and Logic of Optimal Tax*

Modern optimal tax scholarship dates back to economist and mathematician Frank Ramsey's work in the 1920s. Ramsey introduced a model illustrating that an "optimal" tax should minimize distortions to consumers' pre-tax preferences.²²⁵ The logic of Ramsey's model is appealingly simple: Imagine an economy with only two goods, corn and wheat. Without taxes, taxpayers have a bundle of corn and wheat they would prefer to consume. If the government imposes a tax on corn only, making it relatively more expensive, taxpayers are expected to respond by substituting some wheat consumption for corn consumption. This shift is contrary to the consumers' pre-tax preferences and thus reduces their wellbeing. It also induces behavioral changes that reduce tax revenue.²²⁶ Focusing on excise taxes on commodities, Ramsey argued that for rival goods, "like wine, beer and spirits, or complementary [goods] like tea and sugar, . . . taxes should be such as to leave unaltered the proportions in which they are consumed."²²⁷

Early optimal tax work bolstered the concept of market supremacy and elevated the importance of neutrality—against a pre-tax baseline—in assessing tax policies. At the same time, the example of differential commodity taxation

²²³ *E.g.*, Raskolnikov, *supra* note 219, at 546 ("Its fundamental conclusion that the optimal tax is a progressive, nonlinear tax on labor income is as widely accepted in public economics as any. And the argument that this tax is superior to all alternative tax systems has survived for over four decades without widespread dissent.").

²²⁴ *See, e.g.*, *infra* notes 267–74 and accompanying text.

²²⁵ Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 *ECON. J.* 47, 59 (1927).

²²⁶ Others later noted that the tax on consumption also shrinks returns to working and thus reduces labor effort. *See* Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 *STAN. L. REV.* 1413, 1423 n.19 (2006). In economic terminology, because everyone would be better off under a uniform commodity tax, it would be "strictly more efficient." *Id.* Ramsey also showed that taxes should be applied inverse to their elasticity—that is, goods with inelastic demand should bear higher tax rates. Ramsey, *supra* note 225, at 56–57. Such a conclusion would imply that we should tax necessary goods at a higher rate than luxury goods. Because people *must* consume necessary goods, a tax on them is less likely to distort their behavior. *But see* Ron Baiman, *Why the Emperor Has No Clothes: The Neoclassical Case for Price Regulation*, in *POLITICAL ECONOMY AND CONTEMPORARY CAPITALISM: RADICAL PERSPECTIVES ON ECONOMIC THEORY AND POLICY* 276, 280 (Ron Baiman, Heather Boushey & Dawn Saunders eds. 2000) (arguing that Ramsey's pricing model "regressively exploits the vulnerability of consumers with fewer options or preferences" and proposing progressive alternatives grounded in different assumptions, namely weighting utility gains and losses).

²²⁷ Ramsey, *supra* note 225, at 59.

illustrates how the neutrality principle can yield more desirable tax policy outcomes in theory.

Some optimal tax scholars have extended this neutrality logic and used optimal tax models to argue that taxing labor is more efficient than taxing capital.²²⁸ Under certain assumptions, taxing capital arguably imposes a higher tax rate on saving compared to current consumption, because both the investment *and* its return are taxed, while current consumption is only taxed once.²²⁹ That is, under this view a tax on capital income operates as an additional tax burden on deferred consumption. As with the tax on corn or wheat, a capital income tax will theoretically distort individual choices, causing greater current spending, less saving, and reduced wellbeing (when measured against a pre-tax market baseline) as compared to a uniform tax on labor income or consumption alone.²³⁰

2. *The Role of Redistribution*

Ramsey's basic model, however, only provided a starting point for modern optimal tax analysis. Economists Arthur Pigou and James Mirrlees introduced innovations in optimal tax analysis that have slowly come together to make it a dynamic and promising counterpoint to the LPE critique of law and economics. Pigou analyzed taxation as a corrective to negative externalities—the term for social costs that are imposed as a result of a market transaction, but not accounted for in the price—and to the challenge of financing public goods like education and infrastructure.²³¹ Mirrlees applied optimal tax analysis to income taxes and began to refine the model's treatment of distributional issues.²³²

The early Mirrlees model integrated welfare considerations through a “social welfare” function.²³³ This function tallies total societal wellbeing, accounting for the benefits of efficiency, preference satisfaction, and,

²²⁸ Mankiw, Weinzierl & Yagan, *supra* note 219, at 167 (“Perhaps the most prominent result from dynamic models of optimal taxation is that the taxation of capital income ought to be avoided.”). *But see* Sanchirico, *supra* note 221, at 868, 944 (characterizing that conclusion as grounded in “a natively mathematical argument that has been imported into law from economic theory” and using an optimal tax framework to critique the decisive “qualification,” that “the taxpayer’s utility function is ‘weakly separable in leisure,’” which leads to that conclusion).

²²⁹ Bankman & Weisbach, *supra* note 226, at 1424–25.

²³⁰ *See id.* (arguing that a consumption tax is Pareto superior to an income tax); William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1122 (1974).

²³¹ *See* Alan J. Auerbach & James R. Hines Jr., *Taxation and Economic Efficiency*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1347, 1361–62 (A.J. Auerbach & M. Feldstein eds. 2002) (citing ARTHUR C. PIGOU, *A STUDY IN PUBLIC FINANCE* (3d ed. 1947)).

²³² *Id.*; James Mirrlees, *An Exploration of the Theory of Optimum Income Taxation*, 38 REV. ECON. STUDIES 175, 175 (1971).

²³³ Mirrlees, *supra* note 232, at 176.

potentially, other values and inputs that reflect individuals' wellbeing.²³⁴ Mirrlees's initial model recommended, perhaps surprisingly, that the marginal tax rates on labor for the highest earners should be lower than the rates on other earners.²³⁵ This paper launched a field of tax scholarship that has thrived and evolved into the present time.²³⁶

The first generation of optimal tax models endorsed and refined Mirrlees's results. Various optimal scholars endorsed progressive taxation, but only for labor income or consumption.²³⁷ Further, Mirrlees's and others' conception of welfare was limited to a focus on consumption and the tradeoff between labor and leisure.²³⁸ This strain of optimal tax scholarship, with its primary focus on efficiency and reliance on stylized models, reflects the influence of law and economics scholarship that the feature article and essay describe in other areas of legal thought.

The field of optimal tax has been the subject of sustained critique from other tax scholars, including from the perspectives described in Part IV.B above. These critiques have yielded a dialogue within tax that has helped to shape both critical and optimal tax analysis.²³⁹ For example, Linda Sugin critiques the ideal of "endowment taxation," that is, taxation based on each individual's earnings capacity.²⁴⁰ Further, she and others object to optimal tax welfare functions that

²³⁴ *Id.* at 207.

²³⁵ *Id.* ("It is interesting, though, that in the cases for which we have calculated optimum schedules, the maximum marginal tax rate occurs at a rather low income level, and falls steadily thereafter."); Piketty & Saez, *supra* note 220, at 402 (describing the result as "striking").

²³⁶ Mankiw, Weinzierl & Yagan, *supra* note 219, at 150; Christopher Heady, *Optimal Taxation as a Guide to Tax Policy: A Survey*, 14 FISC. STUD. 15, 25 (1993) (describing the foundation role of Mirrlees' 1971 paper); David A. Weisbach, *Introduction to ECONOMICS OF TAX LAW*, at xi, xi (David A. Weisbach ed., 2008); LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* 40 (2008).

²³⁷ See Alvin C. Warren, Jr., *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931, 944 (1975); Michael J. Graetz, *Implementing a Progressive Consumption Tax*, 92 HARV. L. REV. 1575, 1581–82 (1979); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 997 (1992).

²³⁸ Mirrlees, *supra* note 232, at 207 (describing his "simple consumption-leisure utility function" as "a heroic abstraction").

²³⁹ E.g., Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1018–31 (2001); Raskolnikov, *supra* note 219, at 546–50.

²⁴⁰ Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229, 230–31 (2011). Endowment taxation is favored by optimal tax models because it is "neutral" in that it cannot be avoided by changes in behavior, and Sugin observes that it has found favor among legal scholars on equity grounds. *Id.* at 237–39. Optimal tax models typically seek to redistribute from high-ability to low-ability individuals, and some, including Mirrlees, assume that wage rate is a proxy for skill. See Heady, *supra* note 236, at 25 (describing a fundamental assumption of the early models that "differences between the wages of different workers are produced by differences in their fixed productivities"); Mirrlees, *supra* note 232, at 207 (noting that wage income as a proxy for skill may be objectionable, but defending it as "not . . . implausible"). Other scholars have responded, however, that wage rate may not be an accurate proxy for ability as high-skilled workers

disregard non-market contributions to society, individual autonomy, the citizen-state relationship, and other real-world tax policy issues that optimal tax models should consider.²⁴¹ In short, critiques of optimal tax methods and its recommendations are hallmarks of tax law scholarship.²⁴²

Modern optimal tax models have become more sophisticated, with implications that are far less consistent with market fundamentalist commitments. Nearly three decades ago, Professor Edward McCaffery recognized that the “optimal tax literature provides a formidable tool for challenging the traditional, static notion of neutrality.”²⁴³ One area of this more sophisticated work considers how the early stylized models are complicated by changes over time to tax policy and to taxpayers’ productivity.²⁴⁴

Optimal income tax models generally seek to identify the tax rates and tax bases that maximize the aggregate wellbeing of all members of society. The basic tradeoff remains the same as the earlier versions described above: welfare is maximized by achieving a desired distributional outcome at the lowest efficiency cost.²⁴⁵ Welfare can be broadly defined, however, and can also account for alternative theories of distributive justice as well as political values.²⁴⁶ By adjusting the inputs and assumptions built into the model, scholars

may choose to work in low-wage jobs for a variety of reasons, both related and unrelated to the tax rate. Robust literature on this problem arises in a social insurance context. *E.g.*, George A. Akerlof, *The Economics of “Tagging” as Applied to the Optimal Income Tax, Welfare Programs, and Manpower Planning*, 68 AM. ECON. REV. 8, 15–16 (1978) (explaining that, where group membership is endogenous, optimal tagging is more difficult to achieve); Donald O. Parsons, *Imperfect ‘Tagging’ in Social Insurance Programs*, 62 J. PUB. ECON. 183, 183–84 (1996) (discussing tagging in the context of optimal benefits models); Helmuth Cremer, Firouz Gahvari & Jean-Marie Lozachmeur, *Tagging and Income Taxation: Theory and an Application*, AM. ECON. J. ECON. POL’Y, Feb. 2010, at 31, 31 (“Akerlof . . . argued that even if one accepts that such characteristics are not, in and of themselves, pertinent for redistribution, they still have a role to play in designing optimal tax schemes *provided that they are correlated with individuals’ earning potential.*” (emphasis added)).

²⁴¹ Sugin, *supra* note 240, at 250–56; Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1032 (1993); Heady, *supra* note 236, at 17 (“This neglect of administrative costs is a major shortcoming of much of the literature on optimal taxation . . .”).

²⁴² *E.g.*, Sarah B. Lawsky, *How Tax Models Work*, 53 B.C. L. REV. 1657, 1668–83 (2012) (explaining alternative applications of optimal tax models, and critiquing some—for example, use of the models to represent or predict the real world—while advocating their utility in establishing “credible worlds” to inform understandings of real-world issues).

²⁴³ McCaffery, *supra* note 241, at 1035.

²⁴⁴ For a general review of this literature, see Daniel Hemel, *Law and the New Dynamic Public Finance* (Sept. 2021), <https://www.law.nyu.edu/sites/default/files/Hemel%20-%20NYU%20Colloquium%20-%20Law%20and%20the%20New%20Dynamic%20Public%20Finance%20-%2009-15-2021.pdf> [https://perma.cc/WJJ3-L8KT].

²⁴⁵ Mankiw, Weinzierl & Yagan, *supra* note 219, at 150; Heady, *supra* note 236, at 17.

²⁴⁶ Marc Fleurbaey & Francois Maniquet, *Optimal Income Taxation Theory and Principles of Fairness*, 56 J. ECON. LIT. 1029, 1031 (2018).

can adapt the methods to accommodate higher desired levels of redistribution and other goals.²⁴⁷

For instance, while early models used an equally weighted social welfare function,²⁴⁸ modern models typically use a social welfare function that places a premium on equality.²⁴⁹ As a result, a social welfare function which places a large weight on equality can justify high levels of progressive taxation and redistribution.²⁵⁰ In principle the welfare inputs can include nearly anything that can be theoretically quantifiable,²⁵¹ including gender and racial equality²⁵² and

²⁴⁷ See, e.g., Waly Wane, *The Optimal Income Tax when Poverty Is a Public “Bad,”* 82 J. PUB. ECON. 271, 273 (2001) (using a social welfare function in which poverty enters as a public bad, reflecting a social preference for poverty alleviation); Minchung Hsu & C.C. Yang, *Optimal Linear and Two-Bracket Income Taxes with Idiosyncratic Earnings Risk*, 105 J. PUB. ECON. 58, 63 (2013) (maximizing both a utilitarian and a Rawlsian social welfare function); JONATHAN HEATHCOTE & HITOSHI TSUJIYAMA, FED. RES. BANK OF MINNEAPOLIS, STAFF REPORT NO. 507, OPTIMAL INCOME TAXATION: MIRRLEES MEETS RAMSEY 37–39 (2015), <https://www.minneapolisfed.org/research/sr/sr507.pdf> [<https://perma.cc/XKU5-35EM>] (using a model that assumes a social preference for redistribution); ARTHUR OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 119–25 (2015); see also Mirrlees, *supra* note 232, at 176; Atkinson & Stiglitz, *supra* note 219, at 412 (“arguing that any treatment of the choice of tax structures must be centrally concerned with distributional considerations”).

²⁴⁸ E.g., Mirrlees, *supra* note 232, at 176 (describing the social welfare function as a sum of individual utilities and individual utility functions as the same for all individuals).

²⁴⁹ See, e.g., Emmanuel Saez & Stefanie Stantcheva, *Generalized Social Marginal Welfare Weights for Optimal Tax Theory* 11 (Nat’l Bureau Econ. Rsch., Working Paper No. 18835, 2013), https://www.nber.org/system/files/working_papers/w18835/w18835.pdf [<https://perma.cc/EFX3-V5Y4>] (adjusting the social welfare function to demonstrate its ability to accommodate various distributive justice theories, including equality of opportunity and poverty reduction); Hsu & Yang, *supra* note 247, at 68 (utilizing a Rawlsian social welfare function); HEATHCOTE & TSUJIYAMA, *supra* note 247, at 3 (assuming a social preference for redistribution); Piketty & Saez, *supra* note 220, at 459–65 (discussing various alternatives ways to weight individuals differently in a social welfare function).

²⁵⁰ KAPLOW, *supra* note 236, at 46 (observing that an optimal tax framework could justify a substantial degree of redistribution, depending on the choice of the social welfare function and the degree of priority placed on equality); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look At Progressive Taxation*, 75 CALIF L. REV. 1905, 1907, 1946–65 (1987) (showing that optimal tax models justify progressive taxation “under most normative theories and empirical assumptions”).

²⁵¹ As Kaplow and Shavell explain, “To the extent that anything is actually important to individuals, welfare economics encompasses it by definition: Everything that is thought to be socially relevant because it has value to members of society is included in the measure of social welfare.” LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 403 (2002). *But see id.* at 32 n.34 (noting that law and economics tends to reduce such measures to the common denominator of money, but distinguishing this from “embracing ‘wealth maximization’ as the ultimate principle”).

²⁵² See, e.g., Tomer Blumkin, Yoram Margalioth & Efraim Sadka, *Affirmative Action and Economic Justice* 17 (2006) (unpublished manuscript), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.534.3354&rep=rep1&type=pdf> [<https://perma.cc/L7ZG-TDQ7>] (using a welfarist model to argue that affirmative action would improve outcomes relative to an optimal tax and transfer model, assuming a preference for racial and gender equality).

economic power.²⁵³ This flexibility allows the optimal tax framework to account for the priorities of Critical Tax scholarship and other perspectives described above, and to advance egalitarian objectives that have often been thought to be at odds with standard economic models.²⁵⁴

3. Empirically Grounded Models

Early optimal tax analysis primarily relied upon theoretical representative agent models. In recent decades, however, leading optimal tax scholars have focused on “connections between theory and empirical work that were previously largely absent from the optimal tax literature.”²⁵⁵ This empirical work invigorates optimal tax models with real-world data on behavioral responses to policy changes, including measures of elasticities (i.e., responsiveness) to alternative policies and measurements of deadweight loss (i.e., taxpayer responses that impose costs on taxpayers and the government), estimates of the costs of externalities that may be corrected through taxes, and survey and other data on social preferences for equality and redistribution. As a result, optimal tax models now benefit from the insights of behavioral economics,²⁵⁶ experimental studies,²⁵⁷ and survey and other data.²⁵⁸

Empirical studies have also influenced how optimal tax models account for externalities and the welfare benefits of taxation. As the feature article observes, externalities also play a critical role in reconciling market-based models with

²⁵³ See *supra* Part IV.B.3; see also, e.g., Saez & Stantcheva, *supra* note 249, at 1; Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1 (2009) (considering the effect of inheritances on social wellbeing as part of a framework for optimal inheritance tax analysis).

²⁵⁴ See generally Lily L. Batchelder, *Optimal Tax Theory as a Theory of Distributive Justice* (Aug. 8, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724691 (on file with the *Ohio State Law Journal*) (introducing “egalitarian optimal tax” and arguing that optimal tax models can be consistent with resource egalitarian distributive justice).

²⁵⁵ Piketty & Saez, *supra* note 220, at 392.

²⁵⁶ E.g., William Congdon, Jeffrey R. Kling & Sendhil Mullainathan, *Behavioral Economics and Tax Policy* 1 (Nat’l Bureau Econ. Rsch., Working Paper No. 15328, 2009), https://www.nber.org/system/files/working_papers/w15328/w15328.pdf [<https://perma.cc/LZ44-LNYA>].

²⁵⁷ See generally Giulia Mascagni, *From the Lab to the Field: A Review of Tax Experiments*, 32 J. ECON. SURVEYS 273 (2017), <https://onlinelibrary.wiley.com/doi/full/10.1111/joes.12201> [<https://perma.cc/N6X4-S8NY>].

²⁵⁸ E.g., Mankiw, Weinzierl & Yagan, *supra* note 219, at 156–57 (relying on data on wage distributions); SOC. ECON. LAB, <http://socialeconomicslab.org> [<https://perma.cc/6EPW-X9VE>] (describing researchers carrying out “large-scale online surveys . . . to understand how people think, how they form their perceptions, beliefs, and attitudes, and how their views on economic and social policies emerge”). See generally STEFANIE STANTCHEVA, UNDERSTANDING TAX POLICY: HOW DO PEOPLE REASON? (Aug. 2021), https://scholar.harvard.edu/files/stantcheva/files/w27699_1.pdf [<https://perma.cc/5DXW-H4WB>].

real-world constraints.²⁵⁹ Optimal tax models now rely on real-world empirical results to inform policy prescriptions, formally integrating externalities into optimal tax. One line of optimal tax work applies evidence on how individuals interpret their own consumption relative to others around them, which introduces an element of “social standing” as a negative externality to individual gains in consumption.²⁶⁰ Empirical data informs other elements of optimal tax models as well.²⁶¹ For example, Matti Tuomala includes empirically grounded estimates of labor supply elasticities in his optimal income tax models.²⁶² Emmanuel Saez uses refined data on real income distributions to inform the models’ assumptions about the distribution of ability across the population.²⁶³

Additionally, tax scholars and economists have considered a wider array of externalities that might factor into optimal tax models. For example, a developing body of scholarship makes the case that a wealth tax may be desirable in light of the externalities resulting from economic inequality.²⁶⁴ Economist Heather Boushey details how economic inequality may result in suboptimal investments in human capital, skill development, innovation, and

²⁵⁹ See *supra* note 8 and accompanying text.

²⁶⁰ Ravi Kanbur & Matti Tuomala, *Relativity, Inequality, and Optimal Nonlinear Income Taxation*, 54 INT’L ECON. REV. 1199, 1199–1200 (2013).

²⁶¹ E.g., Emmanuel Saez & Stefanie Stantcheva, *A Simpler Theory of Optimal Capital Taxation*, 162 J. PUB. ECON. 120, 120 (2018) (using U.S tax return data on labor income and capital income to derive elasticities of capital supply and inform recommendations on capital taxation); Thomas Piketty, Emmanuel Saez & Stefanie Stantcheva, *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities*, AM. ECON. J. ECON. POL’Y, Feb. 2014, at 230, 230–32, 268 (using time series data on high earners to derive behavior responses to top tax rates and arguing that high-end inequality is a product of “institution-driven changes”—for example in market regulation—rather than pure market responses).

²⁶² MATTI TUOMALA, OPTIMAL INCOME TAX AND REDISTRIBUTION 12–13 (1990) (providing models using empirically grounded estimates of labor supply elasticities and surveying other work using this approach).

²⁶³ Emmanuel Saez, *Using Elasticities to Derive Optimal Income Tax Rates*, 68 REV. ECON. STUD. 205, 207–08 (2001).

²⁶⁴ See, e.g., Glogower, *supra* note 187, at 1450–51; Wojciech Kopczuk, Comments on “Progressive Wealth Taxation” by Saez and Zucman Prepared for the Fall 2019 Issue of *Brookings Papers on Economic Activity* 3 (Nov. 2019) (unpublished manuscript), <http://www.columbia.edu/~wk2110/bin/BPEASaezZucman.pdf> [<https://perma.cc/K5VA-4QDP>] (acknowledging a “somewhat nonstandard (for an economist) argument in favor of wealth taxation is to target externalities from wealth concentration” but also suggesting that this concern can instead be addressed through an estate or inheritance tax); Daniel Shaviro, *Economics of Tax Law*, in 3 THE OXFORD HANDBOOK OF LAW & ECONOMICS 106, 108 (Francesco Parisi ed., 2017) (describing how negative externalities from inequality could justify redistributive taxation); cf. Greg Leiserson, Wash. Ctr. for Equitable Growth, *Taxing Wealth*, in TACKLING THE TAX CODE: EFFICIENT AND EQUITABLE WAYS TO RAISE REVENUE 89, 133 (Jay Shambaugh & Ryan Nunn eds., 2020) (ebook), https://www.brookings.edu/wp-content/uploads/2020/01/TaxBookforWeb_12320.pdf [<https://perma.cc/GR75-8AF5>] (proposing four approaches, one being a wealth tax, to remedy “rising inequality in both income and wealth”).

public spending in general.²⁶⁵ These economics-oriented arguments use data creatively to argue that redistribution through progressive taxation is a critical element in the policy response to these challenges.²⁶⁶

4. *From Policy Prescriptions to Outcomes*

This recent optimal tax work—adopting a broad conception of welfare and relying on increasingly sophisticated empirical inputs—has justified highly progressive or even radical levels of taxation of both labor and capital income. For example, Saez estimates optimal top marginal tax rates on labor income of 50% to 80%, with variations based on different empirically grounded elasticities.²⁶⁷ Other models estimate an optimal income tax rate of more than 70% on the highest earners,²⁶⁸ an annual wealth tax rate of more than 6% on the wealthiest taxpayers,²⁶⁹ and large cash transfers to lower-income taxpayers.²⁷⁰

Notwithstanding these progressive implications of optimal tax scholarship, and criticisms from Critical Tax scholars and others, the history of modern tax policy shows the unmistakable influence of market-centric norms and assumptions. The past half century has witnessed the decline of top marginal income tax and corporate tax rates, gutting of the estate and gift tax, and expansion of regressive payroll taxes.²⁷¹ Recent political developments offer

²⁶⁵ See BOUSHEY, *supra* note 2, at 29–113.

²⁶⁶ *Id.* at 110, 196 (“To put the American Dream within reach of most Americans and reverse rising inequalities of income and wealth, the century-old progressive policy agenda . . . must be updated for the twenty-first century.”); e.g., Wane, *supra* note 247, at 273, 290 (using a social welfare function in which poverty enters as a public bad, reflecting a social preference for poverty alleviation).

²⁶⁷ Saez, *supra* note 263, at 226.

²⁶⁸ E.g., Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. ECON. PERSPS. 165, 171 (2011) (finding a top marginal rate of 73% to be optimal, given inputs to the model based on empirical research); Christina D. Romer & David H. Romer, *The Incentive Effects of Marginal Tax Rates: Evidence from the Interwar Era*, 6 AM. ECON. J. ECON. POL’Y 242, 269 (2014) (calculating a revenue-maximizing rate of 74%).

²⁶⁹ Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation*, 2019 BROOKINGS PAPERS ON ECON. ACTIVITY 437, 498–501, https://www.brookings.edu/wp-content/uploads/2019/09/Saez-Zucman_conference-draft.pdf [<https://perma.cc/HN3Y-CKND>]. In models where the marginal benefits of redistribution outweigh efficiency costs from taxation imposed on the highest income earners, an optimal tax would be set at the “revenue-maximizing rate”—whatever tax rates could raise the greatest revenue from certain subsets of taxpayers.

²⁷⁰ See TUOMALA, *supra* note 262, at 67–69 (evaluating the tax rates which would be required to fund a lump sum subsidy or guaranteed income equal to 40% of mean income); Bankman & Griffith, *supra* note 250, at 1965 (describing Tuomala’s findings elsewhere of an optimal demogrant up to 58% under “realistic” assumptions, citing Matti Tuomala, *On the Optimal Income Taxation: Some Further Numerical Results*, 23 J. PUB. ECON. 351, 360 tbl. 2 (1984)).

²⁷¹ See *infra* notes 298–312 and accompanying text; Piketty & Saez, *supra* note 27, at 21–22.

new possibilities for progressive tax reform,²⁷² but these efforts face challenges and uncertain prospects. Indeed, this crisis of progressive taxation is a primary factor in the entrenched economic inequality that LPE scholars seek to redress.

Scholars offer different accounts of why the tax system has not lived up to its progressive potential, and how efficiency-based frames can undermine its redistributive function. Zachary Liscow, for example, argues that redistribution through the tax system alone is “difficult to attain” because “people compartmentalize their policy views into silos.”²⁷³ Professor James Kwak describes how proponents of lower taxes have simplified and distorted principles of economic analysis in the public and policy discourses, in order to erode support for progressive taxation.²⁷⁴

Because of these limitations, tax scholars have much to learn from LPE, and how its proposed reorientation can result in a more robust commitment to principles of equality and democracy in the tax context as well. Perhaps most importantly, this perspective can yield insights in converting progressive commitments into policy outcomes. The following Part V describes mutual advantages of engagement between tax scholarship and LPE, and how a pluralistic approach to legal thought implied by the experience of tax scholarship can still enable fundamental policy reforms.

V. IMPLICATIONS FOR TAX AND LPE SCHOLARSHIP

LPE offers a trans-substantive perspective on how paradigms of legal thought have influenced different areas of law, and also offers a path forward so the law can evolve to address contemporary challenges. As illustrated in the previous Part, tax scholarship and thought reflect the influences of both the market-centric approach that came to dominate twentieth century legal thought as well as many of the same principles and considerations behind the proposed reorientations under the LPE framework.²⁷⁵ Critical Tax scholarship—like Critical Legal Theory in other areas of law—presages the priorities of LPE that have not yet reached their full realization as policy outcomes. Tax scholarship, however, also offers a unique architecture for a pluralist approach to legal thought, incorporating priorities of LPE as well as insights from the economic analysis of the law.

²⁷² For example, President Joe Biden’s tax reform agenda would raise taxes on corporations and high-income individuals to fund public investments including in education and child care. See *Fact Sheet: The American Families Plan*, WHITE HOUSE (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/> [<https://perma.cc/EZE6-ENKZ>].

²⁷³ Zachary D. Liscow, *Redistribution for Realists*, IOWA L. REV. (forthcoming 2022) (manuscript at 1, 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792122 (on file with the *Ohio State Law Journal*) (emphasis omitted).

²⁷⁴ JAMES KWAK, *ECONOMISM: BAD ECONOMICS AND THE RISE OF INEQUALITY* 7–9 (2017).

²⁷⁵ See *supra* Parts III.A–B.

The following two Parts explore where LPE and tax scholarship might go from here, and advocate a pluralist approach to legal thought. This discussion considers the unique role of taxation in this evolving conversation and describes the mutual advantages of continued engagement between tax scholarship and LPE. The project can help to restore tax law's redistributive potential through a renewed focus on questions of political power and democratic governance, and to help a broader array of tax scholars work more consciously to be aware of, interrogate, and counter the regressive influences of market-dominant approaches to tax policy.

Tax scholarship suggests a way forward for LPE as well, through a pluralistic model that integrates distributional considerations with economic analysis. Even as the frames of efficiency and neutrality have shaped much of legal thought, tax scholarship has consistently preserved a role for considerations of equity and distribution. As a result, the competing frameworks and competing normative commitments in tax scholarship have together yielded a methodological pluralism, a balancing of equity and efficiency (denoting welfare maximization, not reduced to wealth maximization), and an appreciation of the value in economics-based analysis working in conjunction with other social priorities.

At least in principle, the optimal tax framework can account for these priorities in economic models, and progress in this direction has accelerated with the increasing reliance on real-world data inputs rather than purely theoretical representative-agent models. At the same time, tax scholarship faces ongoing challenges in adequately accounting for the priorities of LPE, and in translating these priorities into policy outcomes.

The following Parts describe both the lessons that tax scholarship can offer for LPE, and how the LPE perspective can inform tax scholarship. This discussion ultimately points toward next steps that would allow for the methods and opportunities from these different frames of analysis to advance shared normative commitments.

A. A Pluralist Approach for LPE

This Part explores why tax law and scholarship are critical for the advancement of LPE. First, tax scholarship offers an example of how the legal academy might reckon with the legacy of the law and economics movement while still recognizing the value to be gained from efficiency-based frames.²⁷⁶ This pluralistic approach would take serious account of the reorientations contemplated in the LPE framework, using such concerns to shape the specific contexts in which efficiency principles may be relevant. Second, as a fiscal policy tool responsible for redistribution, the tax system reflects both the consequences of market-centric frameworks and offers the tools to pursue a

²⁷⁶ See *infra* note 297.

more just economic distribution.²⁷⁷ Many of LPE's broader goals are not achievable without changes to tax law.

To the first point, tax scholarship offers an intellectual model that balances conflicting priorities—efficiency and equality—and corresponding modes of analysis, such as economic reasoning *and* theories of distributive justice.²⁷⁸ Many tax scholars have necessarily embraced this intellectual pluralism because fiscal policies inevitably implicate both economic productivity and redistribution.²⁷⁹ Thus, tax scholarship has frequently sought to center questions of inequality both within and alongside economic reasoning and methodologies.²⁸⁰

Goals such as efficiency and promoting welfare can improve policy—with proper caveats and cautions²⁸¹—as part of an agenda grounded in other central priorities such as equality.²⁸² Tax scholarship also foregrounds an inescapable logic contained within an appropriately circumscribed efficiency-based argument: the principle that *ex ante* incentives, including those imposed by the tax system, can affect *ex post* outcomes. For this reason, a rigid commitment to absolute and total economic equality as measured *ex post* could come at the expense of other social values and priorities. At the same time, *ex post* corrections to market outcomes through the tax system can also be necessary to ensure fairness and opportunity.

²⁷⁷ See Leiserson, *supra* note 264, at 133 (advancing taxation approaches as measures to remedy inequality); Liscow, *supra* note 273, at 1 (encouraging a multifaceted approach to redistribution that goes beyond solely using the tax system).

²⁷⁸ Others have noted the same. See Mehrotra, *Envisioning*, *supra* note 111, at 1797 (“Taxation has always been *both* about revenue *and* equity—about effectively raising government funds and fairly distributing fiscal burdens.”). As merely one specific example, optimal tax models merge both economic reasoning and moral philosophy in the form of welfarist analysis that balances the need to maintain economic productivity while redistributing resources to improve equality. See KAPLOW & SHAVELL, *supra* note 251, at 31 n.31 (describing welfarist public finance models, including Mirrlees’ optimal tax model); Bankman & Griffith, *supra* note 250, at 1907 (considering both efficiency and equality).

²⁷⁹ See, e.g., Diamond & Saez, *supra* note 268, at 165; Liscow, *supra* note 273, at 26 (arguing that “since the highly-skilled are so much more productive, they should pay high taxes . . . to provide more resources to be redistributed”); Batchelder, *supra* note 254, at 34–35 (discussing how a “well-constructed endowment tax” could promote redistributive goals without significantly reducing economic productivity).

²⁸⁰ See, e.g., Leiserson, *supra* note 264, at 133; Glogower, *supra* note 187, at 1421–22.

²⁸¹ See generally Liscow, *supra* note 45 (explaining why efficiency-based policy frameworks lead to policies that favor the wealthy); Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591 (2021) (arguing that efficiency analysis is inherently biased); Baiman, *supra* note 226.

²⁸² See OKUN, *supra* note 247, at 89–93 (explaining that different people would weight efficiency and equality differently, leading to different tax and transfer policies); *id.* at 91 (explaining that, in balancing efficiency and equality, he would “instruct the society to weight equality heavily, but it should rely on the democratic political process it establishes to select reasonable weights on specific issues as they arise”).

The canonical cases from optimal tax theory, such as the reason why we may not want to tax corn and wheat differently, illustrate the basic logic of the neutrality principle²⁸³—even if acceptance of this logic presumes that the market is antecedent to the state. That is, regardless of any background distortions, policymakers most likely should tax corn and wheat neutrally, if consumers would otherwise demand these goods in equal proportions. The corn and wheat scenario also illustrates how not all choices and market behaviors are necessarily characterized entirely in terms of coercion and power relationships, or at least should not be understood exclusively in those terms. The challenge then, for both tax scholarship and legal scholarship in general, is determining when a frame that is grounded in market outcomes is beneficial, and when it is oversimplified and even deleterious to legal analysis. Tax scholarship also illustrates that the use of economic analysis does not require the exclusive reliance on this analysis nor a strict commitment to follow its policy recommendations.²⁸⁴

By foregrounding the logic of efficiency-focused frameworks, tax scholarship also offers a case study illustrating how economic reasoning has rewritten so many areas of legal thought. A simple clarity underlies the welfarist models' logic—such as in the case of the corn and wheat example—which can then be repurposed or extended to other policy questions.²⁸⁵ Relatedly, welfare economics also offers a methodological frame that allows for tax policy analysis balancing the need for redistribution against the disutility (inefficiency) effects of the high tax rates necessary for redistribution.²⁸⁶ At the same time, as much tax and nontax scholarship has noted, accepting the premises of efficiency-based analysis without sufficient caveats and scrutiny has likely contributed to structural inequality and the institutional failures the feature article details.²⁸⁷ The trajectory of U.S. tax policy in recent decades illustrates this danger and the

²⁸³ See *supra* note 226 and accompanying text; *supra* Part IV.C.1.

²⁸⁴ See, e.g., Repetti, *New Paradigm*, *supra* note 204, at 1131.

²⁸⁵ Scholars have also critiqued the basic assumptions of welfarist models. See Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349, 351–52 (1999) (describing the anti-welfarist critique that “interpersonal comparisons of utility had no scientific basis”); Amartya Sen, *On Weights and Measures: Informational Constraints in Social Welfare Analysis*, 45 ECONOMETRICA 1539, 1559–62 (1977) (describing informational constraints in welfarism); Batchelder, *supra* note 254, at 20–31 (describing critiques of welfarism).

²⁸⁶ See Diamond & Saez, *supra* note 268, at 165. See generally Mirrlees, *supra* note 232.

²⁸⁷ See, e.g., Liscow, *supra* note 45, at 1652; Zachary Liscow & Daniel Giraldo Paez, *Inequality Snowballing* (manuscript at 1) (Aug. 29, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3327460> (on file with the *Ohio State Law Journal*) (explaining why efficiency-based rules can lead to policies that harm the poor, the effect of which compounds over time); see also MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 5 (2006) (noting that some critique potential Pareto efficiency because an inequality-increasing policy can still be efficient under the Kaldor-Hicks principle).

risks of overreliance on simplified efficiency frames.²⁸⁸ Tax scholarship and policy thereby demonstrate both advantages and the risks of a pluralist approach to legal analysis.

Taxation is also critical to LPE because the goals of the LPE framework are impossible without taxation. For example, the feature article proposes to evaluate economic relationships in light of “highly disparate resource allocations that are themselves products of background legal rules.”²⁸⁹ These resource allocations have been partly exacerbated by tax policies through the influence of the law and economics movement, and the remediation of these disparate resources allocations requires an understanding of tax and transfer policies. The feature article also calls for “more equal distribution of resources and life chances” and “more public and shared resources and infrastructures.”²⁹⁰ These goals, part of the “positive agenda” invited by the feature article, implicate questions of fiscal policy that will necessarily require tax policy interventions.²⁹¹

Taxation is also intrinsic to LPE’s proposed reorientation from antipolitics to democracy.²⁹² The feature article calls for an economic order that is accountable to “the democratic will of the people.”²⁹³ As we have argued elsewhere, democratic engagement and fiscal engagement are deeply intertwined.²⁹⁴ Moreover, re-centering law in democratic values will also necessarily require greater government mediation of economic relationships and redistribution of resources, which, in turn, will rely on tax policies. Without redistribution and fiscal engagement through the tax system, there would be no democracy to center and deeper economic inequality on the horizon.

The market-centric framework has proven inadequate to address modern challenges to our legal and fiscal institutions. LPE rightly calls for an approach to legal analysis that prioritizes the most important questions facing our society and recognizes the value of analytical modes beyond efficiency and market-

²⁸⁸ See Piketty & Saez, *supra* note 27, at 21–22 (explaining that “the progressivity of the U.S. federal tax system at the top of the income distribution has declined dramatically since the 1960s”).

²⁸⁹ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1819.

²⁹⁰ *Id.* at 1834.

²⁹¹ *Id.* at 1834. A wealth tax would directly address the call for equitable distribution of resources while also providing the means for more shared resources. See generally Glogower, *supra* note 187 (on the justifications for a wealth tax).

²⁹² Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1827–32 (describing the LPE shift from “antipolitics to democracy”); *supra* notes 198–214 and accompanying text.

²⁹³ Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 8, at 1827.

²⁹⁴ BEARER-FRIEND, *supra* note 184, at 3 (“More than just closing tax loopholes or repealing fly-by-night tax giveaways to the rich, tax policy can be central to the functioning of our democracy by rebuilding the middle class and reviving the full potential of our public institutions.”); Wallace, *supra* note 206, at 1239 (asking how tax policies can strengthen democracy); Jurow Kleiman, *supra* note 214, at 1885 (arguing that local tax policies are important to public engagement and voter power).

based reasoning. Tax scholarship offers examples of the intellectual pluralism necessary to effectuate this reorientation, not because tax scholars are different in any way, but because they have embraced basic insights of economic analysis and the role of *ex ante* incentives while simultaneously grappling with distributional issues, which are both inherent in taxation.

B. *A Renewed Emphasis for Tax Scholarship*

As described above, the LPE reorientation calls for re-centering relationships of power and economic difference, resituating policy choices as antecedent to market structures, and giving priority to considerations marginalized under prevailing efficiency-oriented norms and assumptions.²⁹⁵ This Part describes four ways that tax scholars can do this: by (1) providing a broader context for the regressive trends in contemporary tax policy, (2) refocusing attention on questions of political economy, (3) interrogating market-centric assumptions, and (4) centering qualitative values. These shifts may be particularly meaningful for scholars who have tended in the past to dismiss or discount the work of Critical Tax scholars. As described above in Part III.B, works in tax scholarship have long engaged with LPE priorities, but LPE also offers additional perspective and momentum from which to advance this existing literature.

First, LPE offers a broader context for evaluating the role of the market-centric analysis in shaping regressive trends in contemporary tax policy. Even as optimal tax frameworks contemplate redistribution and could warrant high or even radical levels of taxation in practice, and while many tax scholars have advanced considerations that generally support more progressive tax systems, in recent decades the opposite has occurred.²⁹⁶ In this respect, the evolution of the modern progressive tax system reflects the influence of the efficiency-based frames, which have the effect of “encasing” market outcomes and economic inequality from the prospect of redistributive progressive taxation.²⁹⁷ LPE helps to contextualize this phenomenon within the broader trends that have shaped other areas of law in recent decades.

Consider the historical trajectory of top marginal income tax rates. Initially 7% in 1913, the top marginal federal income tax rose quickly to 67% in 1917.²⁹⁸ The top rate reached 92% in the 1950s, then declined to 70% in the 1960s and never fell below that for the entire decade of the 1970s.²⁹⁹ Consistent with the story of the rise of the law and economics movement, however, Congress and the Reagan administration sharply reduced top marginal tax rates in the 1980s,

²⁹⁵ See *supra* Part III.A.

²⁹⁶ See generally Piketty & Saez, *supra* note 27.

²⁹⁷ See Ari Glogower & David Kamin, *The Progressivity Ratchet*, 104 MINN. L. REV. 1499, 1502–05 (2020).

²⁹⁸ TAX POL’Y CTR., *supra* note 28.

²⁹⁹ *Id.*

mainly in the name of efficiency.³⁰⁰ The rate dropped as low as 28% and has never risen above 39.6% since.³⁰¹

During this era some policymakers pushed for even more drastic reductions enacted in the name of efficiency and neutrality, including eliminating the progressive structure entirely and shifting to a “flat tax.”³⁰² In that same period, other tax cut trends have benefitted the most well off, including the vitiation of the estate tax,³⁰³ reduced corporate tax rates,³⁰⁴ and the easing of restrictions for businesses to pay only the (lower) individual rates, and, most recently, special benefits for those “pass-through” businesses.³⁰⁵ These trends mirror regressive changes to state and local tax systems during this era, including property tax caps that often disproportionately benefit homeowners with the most expensive houses and state constitutional amendments limiting state and local taxing authority.³⁰⁶

³⁰⁰ See Kornhauser, *supra* note 166, at 466–69.

³⁰¹ TAX POL’Y CTR., *supra* note 28. The top effective rate on certain forms of income could still exceed 40% in some cases, even under the current 37% top marginal rates under I.R.C. § 1(a), (d), (j), as a result of additional surcharges such as the net investment income tax under I.R.C. § 1411 and payroll taxes under I.R.C. § 3101.

³⁰² Some variations of this approach retained more modestly progressive elements but were all generally grounded in efficiency justifications. In some cases, proponents also suggested replacing the income tax base with a different tax base more amenable to flat rates. See, e.g., JOEL SLEMMOD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES 349–89 (5th ed. 2017) (describing possible consumption tax alternatives to the income tax base).

³⁰³ See MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 4–5 (2005) (detailing the lobbying effort to eliminate the estate tax in the early 2000s); Lily L. Batchelder, *Leveling the Playing Field Between Inherited Income and Income from Work Through an Inheritance Tax* 54 (N.Y.U. L. & Econ. Rsch. Paper Series, Working Paper No. 20-11, 2020), <https://ssrn.com/abstract=3526520> (on file with the *Ohio State Law Journal*) (describing the 2017 changes to increase the estate tax exemption to over \$11.5 million per person as part of a trend toward non-taxation of inherited income).

³⁰⁴ See Glogower & Kamin, *supra* note 297, at 1518–32 (describing the 2017 tax cuts for businesses, including reducing the corporate tax rate from 35% to 21% and how these reductions were framed in terms of efficiency and neutrality).

³⁰⁵ See, e.g., *id.* at 1519; Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209, 218–20 (2019) (describing lobbying efforts before and after the enactment of a special tax cut for certain businesses as part of the 2017 tax legislation); Clint Wallace, *The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act*, U. CHI. L. REV. ONLINE *1, *11 (June 29, 2020) (describing a \$135 billion retroactive tax cut added into coronavirus response legislation at the behest of real estate industry lobbyists); David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1442 (2019).

³⁰⁶ For example, in 1978 California voters adopted Proposition 13 limiting tax rates on real estate, and in 1992 Colorado voters approved the Taxpayer Bill of Rights capping tax collections for all levels of government in the state. See generally Michael R. Johnson, Scott H. Beck & H. Lawrence Hoyt, *State Constitutional Tax Limitations: The Colorado and California Experiences*, 35 URB. LAW. 817 (2003) (describing these tax limits and their

At the same time, other elements of the tax system also minimize the burden on the highest income taxpayers and reduce its overall progressivity effect. Flat taxes on wages, rather than progressive taxes, fund the Great Society programs of the 1960s—currently totaling 12.4% of wage income for Social Security (up to a maximum of \$137,700 in 2020) and 2.9% of wage income for Medicare (with no cap).³⁰⁷ The individual income tax is the largest source of federal revenue, consistently providing 40% to 50% of the total over the past seventy years.³⁰⁸ The corporate tax—which is largely borne by higher income capital earners—once provided the bulk of the remainder of total federal tax revenue, while less progressive payroll taxes provided only a small portion.³⁰⁹ Those proportions are now flipped, with the corporate tax providing less than 10% of federal revenue and payroll taxes providing over 30%.³¹⁰ This trend undermines the progressivity of the tax system because the burden of payroll taxes is largely regressive: lower income people now pay a much higher portion of their take-home income to these taxes than to federal income taxes, with two-thirds of families paying more in payroll taxes than federal income taxes.³¹¹ At the state and local level, property tax caps have similarly pushed states and municipalities to raise more of their revenue from regressive sales taxes and fees.³¹²

consequences on government and taxpayers); IRIS J. LAV & MICHAEL LEACHMAN, *CTR. BUDGET & POL'Y PRIORITIES, STATE LIMITS ON PROPERTY TAXES HAMSTRING LOCAL SERVICES AND SHOULD BE RELAXED OR REPEALED 16–20* (2018), <https://www.cbpp.org/sites/default/files/atoms/files/7-18-18sfp.pdf> [<https://perma.cc/K4MP-GS9H>] (describing inequitable consequences of property tax limits).

³⁰⁷ STAFF OF THE JOINT COMM. ON TAX'N, *JCX-14-20, OVERVIEW OF THE FEDERAL TAX SYSTEM AS IN EFFECT FOR 2020*, at 23 (2020), <https://www.jct.gov/CMSPages/GetFile.aspx?guid=52ce35d7-ec12-481a-b38e-ef9d50b1112> [<https://perma.cc/WRL9-AQKL>] [hereinafter *OVERVIEW*]; I.R.C. §§ 3101–3102, 3111–3113 (providing payroll tax rates). The social security benefit formula has a slightly progressive effect but does not impose a significant burden on the highest income taxpayers. *See* ANDREW G. BIGGS, MARK SARNEY & CHRISTOPHER R. TAMBORINI, *SOC. SEC. ADMIN., ISSUE PAPER NO. 2009-01, A PROGRESSIVITY INDEX FOR SOCIAL SECURITY 1* (2009), <https://www.ssa.gov/policy/docs/issuepapers/ip2009-01.html> [<https://perma.cc/5NXH-VTDZ>].

³⁰⁸ *OVERVIEW*, *supra* note 307, at 32.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ William G. Gale & Jeffrey Rohaly, *Three-Quarters of Filers Pay More in Payroll Taxes than in Income Taxes*, 98 *TAX NOTES* 119, 119 (2003) (“The payroll tax is sharply regressive with respect to current income (that is, the average tax rate falls as income rises), whereas the income tax is progressive.”). Still, the fact of these different types of taxes facilitate the oft-parroted complaint that some large percentage of taxpayers do not pay federal income taxes. *See, e.g.*, Michael D. Shear & Michael Barbaro, *In Video Clip, Romney Calls 47% ‘Dependent’ and Feeling Entitled*, *N.Y. TIMES* (Sept. 17, 2012), <https://thecaucus.blogs.nytimes.com/2012/09/17/romney-faults-those-dependent-on-government/> [<https://perma.cc/DK8Z-ED6S>]; WILLIAMSON, *supra* note 208, at 47, 172–73 (quoting survey respondents who complained about “having to take care of those who don’t pay taxes” and “stupid people who don’t pay [taxes]”).

³¹² *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 740* (8th ed. 2016) (summarizing the research consensus that

Although caution is warranted in claiming causal relationships between intellectual movements and policy outcomes, the political rhetoric justifying these trends reflect the influence of the law and economics on tax policy and mirror the influence of the market-centric approaches in other areas of public law that the feature article describes. Economists Emmanuel Saez and Gabriel Zucman argue that the cuts to the three key pillars of progressive federal taxation—the individual income tax, the corporate tax, and the estate tax—have now brought the overall tax system closer to a “flat tax” where the lowest income taxpayers now pay a similar rate to those at the top.³¹³

As this account illustrates, while progressivity remains central to tax theory and scholarship, the prioritization of efficiency and neutrality has undermined its role in the tax system in recent decades. Proponents of tax cuts for the wealthy have successfully sidelined considerations of fairness and distribution, often by deploying arguments about efficiency and economic growth that find support in optimal tax models.³¹⁴ LPE helps to contextualize this disconnect between tax scholarship’s consistent commitment to redistribution and its declining role in the tax system. Further, the LPE framework provides tax scholars with analytical tools to address this wedge between theory and policy, and to re-center considerations of power, equality, and democracy in the tax system.

Second, tax scholars can also continue to operationalize the LPE reorientation—and thereby respond to the misappropriation of tax theory and scholarship to justify regressive tax policies—by continuing to ask political economy questions and thereby shifting the emphasis in values and priorities. This could mean focusing attention on threads of current tax scholarship that are broadly aligned with the LPE priorities, including work in the areas of critical tax,³¹⁵ taxation and democracy,³¹⁶ and on the question of how economic power

property tax limits lead to greater reliance on sales taxes, fees, and assessments); Gary M. Galles & Robert L. Sexton, *A Tale of Two Tax Jurisdictions: The Surprising Effects of California’s Proposition 13 and Massachusetts’ Proposition 2½*, 57 AM. J. ECON. & SOCIO. 123, 124, 131 (1998) (reporting that local governments increased nontax fees in response to tax limiting laws); Colin H. McCubbins & Mathew D. McCubbins, *Proposition 13 and the California Fiscal Shell Game*, 2 CAL. J. POL. & POL’Y 1, 20 (2010) (finding increased fee revenue in California in response to Proposition 13); Ronald J. Shadbegian, *The Effect of Tax and Expenditure Limitations on the Revenue Structure of Local Government, 1962–87*, 52 NAT’L TAX J. 221, 222 (1999) (finding that tax and expenditure limits cause local governments to rely more on nonproperty tax revenue).

³¹³ EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* 13–18 (2019); Saez & Zucman, *supra* note 269, at 439–40. Other analyses find that the tax system is still modestly progressive, using different measures of taxes and income. See, e.g., William G. Gale, *Saez and Zucman Say that Everything You Thought You Knew about Tax Policy Is Wrong*, BROOKINGS (Oct. 23, 2019), <https://www.brookings.edu/blog/up-front/2019/10/23/saez-and-zucman-say-that-everything-you-thought-you-knew-about-tax-policy-is-wrong/> [<https://perma.cc/D384-JK5S>].

³¹⁴ See *infra* note 322 and accompanying text.

³¹⁵ See *supra* Part IV.B.1.

³¹⁶ See *supra* Part IV.B.4.

should inform tax policy and design.³¹⁷ More than simply paying increased attention to these threads of tax scholarship, the framework would re-center the academic discourse and policy analysis *around* these considerations.

In this reorientation, considerations of power relationships and economic difference would not be relegated to “side issues” or departures from the standard modes of policy analysis, but instead would be central considerations. For just one example of the potential significance of this shift in emphasis, economist Wojciech Kopczuk observes that wealth concentrations may result in externalities that should be accounted for in an optimal tax model, but also notes this concern is “somewhat nonstandard” for an economist.³¹⁸

The substance of these questions is not unfamiliar in tax scholarship. Shifts in the framing of these questions and their emphasis as contemplated by the LPE reorientation, however, could nonetheless yield a qualitatively different form of inquiry. For example, instead of a traditional inquiry as to how tax policy should balance competing considerations of equity and efficiency,³¹⁹ reframing the question might instead start by asking how to reduce economic inequality, even at some cost in efficiency or economic growth.

Third, tax scholars should interrogate the premises that underlie the analytic methods of market-centric frames. These premises may include the presumption that reducing inequality necessarily interferes with desirable efficiency or economic growth,³²⁰ the presumption that tax reductions always shift the fiscal system closer to a “neutral” pretax baseline, or even the presumption that efficiency—as traditionally understood in terms of welfare maximization through market activity—should be understood as an independent social objective.

Reorienting tax scholarship in this manner would also entail a more critical investigation of the background structures that determine market behavior and outcomes, and the political decisions that gave rise to these structures. The LPE reorientation’s focus on political choices can help illuminate the current structure of the tax code and how its statutes should be interpreted. To be sure, prior tax scholarship has examined the role of political pressures in shaping the structure of the tax system. For example, scholars have described how the vitiated estate tax and the preferences for the wealthy introduced in the 2017 tax legislation resulted from interest group lobbying dressed in simplified versions of market-centric analysis.³²¹ The LPE reorientation would again provide a

³¹⁷ See *supra* Part IV.B.3.

³¹⁸ Kopczuk, *supra* note 264, at 3.

³¹⁹ See, e.g., OKUN, *supra* note 247, at 86–98.

³²⁰ For recent work offering reasons why economic inequality constrains economic growth, see generally BOUSHEY, *supra* note 2. See also *supra* notes 265–66 and accompanying text.

³²¹ On the effects of interest group lobbying leading to the erosion of the estate tax, see generally GRAETZ & SHAPIRO, *supra* note 303, and Michael J. Graetz, “Death Tax” Politics, 57 B.C. L. REV. 801 (2016). On the influence of interest group lobbying behind regressive preferences for business income in the 2017 tax legislation, see Ari Glogower, *The Rhetoric*

broader context for these investigations, and enable tax scholarship to imagine alternative economic and market arrangements that could arise from a different set of policy choices grounded in commitments to equity and democracy. In this respect, the framework could enable a greater receptiveness to bold reforms and structural redesigns of the tax system.

Fourth, tax scholars should embrace and center unquantifiable values, and avoid the limitations of incrementalism that is often recommended by market-centric analysis. Prioritization of easily quantifiable values can help to explain why optimal tax models, which can in theory sanction high levels of taxation and economic redistribution,³²² have tended to instead have the opposite influence on tax policy. As described above, the ascendancy of optimal tax analysis has accompanied a general decline in the progressivity of the tax system in recent decades.³²³ Professor James Repetti argues that tax reforms often prioritize efficiency more than equity because the benefits of the latter often “appear intangible and unquantifiable,” even if the tax system should in principle account for both.³²⁴ Repetti’s work also illustrates how many benefits from equity are in fact tangible and quantifiable.³²⁵ In this respect, the LPE reorientation helps explain why a formal but “thin” commitment to redistributive principles may be insufficient to enable fundamental structural reform. Under the framework, such considerations would be of central importance, even when they are difficult to quantify or model.

This discussion only begins to explore directions for engagement between tax scholarship and the LPE reorientation. This Part described some possible implications of LPE for tax scholarship, with the goal of initiating a broader conversation about how the framework can advance the work of tax scholars seeking to reorient tax scholarship around an alternative set of values, and to reemphasize the redistributive role of the tax system.

VI. CONCLUSION

LPE charts a reorientation of legal thought to address our moment of economic, environmental, institutional, racial, and public health crises. Under this view, market-centric analytic modes of legal thought dominant in recent decades have been inadequate to this task. They fail to adequately prioritize

and Reality of Small Business Preferences in the 2017 Tax Legislation, 16 FORUM 441, 443 n.13 (2018); cf. Wallace, *supra* note 305, at *1–2 (describing similar influence and results in tax provisions of coronavirus response legislation more recently).

³²² See *supra* notes 303–05 and accompanying text.

³²³ Of course, other factors beyond the ascendancy of optimal tax theory alone may also explain this trend, such as increased capital mobility and global tax competition. See generally Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000).

³²⁴ James R. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Individual Income Tax*, 23 FLA. TAX REV. 522, 596 (2020).

³²⁵ *Id.*

principles of equality and democracy, to account for the role of coercion and power relationships in market activity, and to recognize how the structure of the market depends upon contingent policy choices.

This Article argues that taxation is critical to LPE and describes the mutual interdependence of tax scholarship and the reorientation that LPE scholars envision. Because of the unique commitments of the tax system, tax scholarship has continuously engaged with the role of economic difference in the law. Moreover, LPE's success in reorienting legal thought will depend in part on its engagement with questions of tax and fiscal policy.

The experience of tax scholarship offers lessons that can advance the goals of LPE, and that suggest how the LPE framework might be interpreted. In particular, tax scholarship and thought hold in tension the insights of the efficiency-oriented frameworks—such as the circumstances where applications of the neutrality principle can be welfare-enhancing—as well as the priorities of LPE. More generally, tax scholarship suggests the importance of striking a balance between market principles and government intervention, with the tax system as a critical policy instrument for maintaining this balance.

At the same time, the recent course of tax policy also reflects the perils of failing to prioritize principles of equality and democracy, and thereby reinforces the urgency of LPE's project to reorient legal thought. Just as tax is vital to LPE, the LPE project offers a path for tax scholars and policymakers to restore the progressive promise of our tax and fiscal system. Tax scholarship can benefit from LPE's call to center principles of equality and democracy in legal thought, as well as its skepticism of analysis premised on an autonomous market and that prioritizes efficiency and neutrality. LPE's reorientation can also help highlight how the tax system, like other areas of law, results from politically contingent policy choices, rather than the objective application of neutral or objective theoretical principles.

These ties between taxation and LPE ultimately point toward a shared direction for both. This approach would recognize the value of efficiency-based frames, albeit when properly contextualized and subordinated to the supervening values that LPE prioritizes.

Legal reforms that respond adequately to the current moment will require innovative and radical thinking. LPE offers legal scholars a path for an inclusive reimagining of our economic and political systems. Tax law and scholarship can and should play a pivotal role in this broader legal project of redressing concerns of power, inequality, and democracy.