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Dilemmas of Tax Policy in a Globalized Economy

On the domestic level, tax is a central sphere in which the sometimes conflicting normative goals underlying our collective lives in the state intersect. Tax decisions are known for their impact on the size and distribution of the national welfare pie. They are, furthermore, significant to the shaping of taxpayers' identities and the kinds of communities we live in, as well as innately linked to our sense of belonging to and solidarity with the state. The state, we would like to believe, designs tax rules that are compatible with the fundamental normative values shared by its constituents: seeking to maximize the welfare pie and distribute it justly while reinforcing citizens' identity, supporting their communities, and representing their democratically pronounced collective will. The reality of income taxation is far more complex, of course, with budget constraints, technical complexities, and interest groups' politics often dominating the normative discourse. Without underestimating the complexities of the domestic level, this chapter (indeed, this book as a whole) looks beyond that sphere to focus on the global level. This chapter concentrates on the single state and assesses how the global sphere and, in particular, international competition impact domestic tax policy. I ignore, for the time being, any potential bilateral or multilateral cooperation between states. I will address such options further on in the book.

The decentralized nature of international taxation puts states in competition for residents and investments. This chapter makes the argument that the intensifying competition between states transforms the very basis of states' tax policy. Competition – the inevitable result of the decentralized nature of international taxation – makes everything about tax policy contestable and contingent upon states' respective competitive positions: efficiency, redistribution, the concepts of community, and personal and collective identity. Absent competition, in the domestic tax policy realm, tax is a coercive tool used by the state to overcome collective action problems in financing public goods, regulating behavior, and contending with redistributive challenges. In conditions of competition, the state-citizen relationship is transformed in that states become, to a large degree, market actors competing for residents (individuals as well as businesses), factors of production, and tax revenues. The implicit traditional conception of states sees them as powerful sovereigns that operate in a closed economy with the capacity to make and enforce mandatory rules, impose taxes, and set redistribution. However, in many ways states have come to resemble actors in a competitive global market, where their ability to govern is increasingly shaped by the international supply and demand of resources and the elasticity of taxpayers' choices. Individuals and businesses now have at their disposal a broad range of taxing regimes, rules, and rates from which to pick and choose, while states – which are gradually losing their monopolistic taxation position – are pressured to offer competitive deals of desired public goods and services at a low price.

In the absence of competition, policymakers could design tax policies with at least one clear purpose in mind: serving their constituents, namely, the group of people whose interests they are supposed to promote. Once the relevant group of constituents has been identified, policymakers must set their goals (e.g., maximizing welfare, promoting distributive justice, or supporting desirable social institutions and communities) and determine the optimal strategies for their advancement. These goals often clash and require sophisticated balancing, which makes policymaking anything but trivial. Yet at least it is relatively clear whom the policy should serve and what means are available for achieving this.

Tax competition throws a rather dramatic dimension of complexity into the mix, for it provides some taxpayers with an alternative: to shift their capital, residency, tax base, and even citizenship to another jurisdiction. Hence, not only does domestic tax policy affect taxpayer behavior, it also determines the composition of the group of people whose interests will (indeed should) be served. Moreover, in the current decentralized international tax regime, taxpayers do not even have to fully commit to the taxing regime of any given state in its entirety. Competition often enables taxpayers to unbundle regimes and (for those who are able to effectively tax plan their income production) pick and choose from among the specifics of the taxing regimes of different states.

Tax competition is by no means perfect competition. There are barriers to shifting capital and residency from one state to another, and tax is certainly not the only consideration in residency, investment, and citizenship choices. Tax planning is similarly constrained, and states are often able to enforce restrictions with anti-tax-avoidance measures. Yet, on the whole, it seems generally plausible to assume that changing taxing jurisdictions is a viable enough option for marginal taxpayers to actually influence their pattern of investment, how they run their business, the location of their residency, or even their citizenship choices. Of course, not all taxpayers are able or interested in considering alternative jurisdictions. But in order to make a difference for tax-policy purposes, it is sufficient that there is a group of taxpayers, investors, and residents who are weighing such alternatives.

By providing taxpayers with practicable alternatives, then, tax competition turns the decision-making process on its head. The state no longer makes coercive demands on a set group of subjects in order to promote its collective goals but, rather, increasingly acts as a recruiter, soliciting investments as well as residents. And since the state's tax policy shapes (among other things) the incentives of both individuals and multinational enterprises to be (or become) residents and/or investors in its jurisdiction, that policy needs to be competitive. Thinking strategically, the state must provide incentives that not only maximize the benefits for its current constituency but also attract "the right kind" of residents, investors, and investments.

Different groups of potential taxpayers can offer different benefits in terms of efficiency, distribution, political power, and even collective identity. Thus, policymakers set not only the size of the welfare pie and its distribution but also the size and composition of the very group whose interests they are supposed to represent. Indeed, whether they like it or not, in the current reality of global tax competition, policymakers' decisions affect both the size and makeup of their constituents. Tax policy goals are no longer tailored to a set group of constituents, but rather, the group of taxpayers and the tax regime to which they are subject are shaped simultaneously. Surprisingly perhaps, policymakers' additional power to shape their constituent group undermines their ability to set policy in line with the classic goals of income tax.

The bottom line, then, is that tax competition seriously impacts classic tax-policy goals. As this chapter will explain, the incentive to cater to the preferences of the more attractive and mobile potential residents and investors drives policymakers to constrain the state's redistribution function. It forces states to choose between their existing constituents and other, perhaps more attractive, ones and to forego democratic participation traditions of voice for exit-based practices, as mobility becomes a dominant relevant factor in attaining economic rights and benefits.

Section 1.1 of this chapter reviews briefly the goals of domestic income-tax policy: efficiency and distributive justice as well as personal and collective identity. Section 1.2 then presents the marketization of state policies under competition and their fragmentation due to the ability of certain taxpayers to pick and choose from among the taxing mechanisms offered by different states. Finally, Section 1.3 explains how the competitive international arena calls into question each of the normative goals described in Section 1.1, and makes their proper balancing challenging for policymakers who are now forced to make hard choices and compromises in setting domestic tax policy.

1.1 Income Tax Policy in a Closed Economy

Income tax is traditionally regarded as a vehicle for allocating the costs of government in an equitable and efficient manner.[1] Under this canonical depiction, income taxation is intended to achieve the sometimes contradictory goals of maximizing social welfare and promoting distributive justice. These goals are often also referred to as equity, efficiency, and simplicity, based loosely on Adam Smith's maxim regarding a good tax.[2]

a. Efficiency

Indeed, since Smith, there has been wide consensus that taxes should be as efficient as possible.[3] In traditional thought, efficiency was understood

[1] *See, e.g.*, Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 310–11 (4th ed. 1925); Liam Murphy & Thomas Nagel, The Myth of Ownership 12 (2002); Michael J. Graetz & Deborah H. Schenk, Federal Income Taxation: Principles and Policies 25–27 (4th ed. 2002); Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 Tax L. Rev. 1, 3 (2006–2007).

[2] Adam Smith, Principles of Taxation (1776):

> I. The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities. . . . II. The tax which each individual is bound to pay ought to be certain, and not arbitrary. . . . III. Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it. . . . IV. Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state.

[3] While the concept of efficiency can encompass a wide variety of normative goals, in current legal scholarship, efficiency analysis often goes hand in hand with a utilitarian vision of income taxation as maximizing the combined welfare of society at large (with utility often taken for granted as the material well-being of taxpayers). *See, e.g.*, Edward J. McCaffery, *Tax's Empire*, 85 Geo. L.J. 71, 75, 106 (1996) (describing the utilitarian tradition of tax scholarship and offering a political interpretive analysis to complement both utilitarianism and formalism in tax policy analysis); Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation* (review of Joel Slemrod (ed.), Does Atlas Shrug? The Economic Consequences of Taxing the Rich, 2001), 111 Yale L.J. 1391, 1413–16 (2002) (calling for a new balance between equity and efficiency analysis in tax policy).

as preventing taxation from interfering with the free market – that is, as ensuring that the economy operates as it would in the absence of taxes.[4] Under this view, the free market maximizes the well-being of its participants. The "wedge" that taxes create between the price paid by the consumer and the price received by the producer undermines the efficiency of the free market.[5] An efficient tax raises revenues while minimizing "deadweight losses" (i.e., the costs of distorting economic decisions). When some activities are taxed more heavily than others, taxpayers are incentivized to avoid heavily taxed activities in favor of relatively untaxed ones that they would otherwise value less.[6] Thus, a central goal of tax reform is often neutrality: the avoidance of arbitrary differences in tax rates across different types of consumption and investment. This helps to reduce distortions of decisions about what to consume and how to produce it.

Neutrality, however, does not always promote economic efficiency. Other things being equal, it is desirable to tax more heavily those goods for which demand and supply are relatively price insensitive. Thus, in recent years, "optimal taxation" has been suggested as a way to design a more efficient tax system.[7] Focusing on minimizing the deadweight loss caused by taxation, optimal taxation recommends "an 'inverse elasticity rule' – that taxes should, all else being equal, be levied in inverse relation to a party's degree of commitment to a good or activity, with inelastically-demanded necessities bearing higher taxes than elastically-demanded luxuries,"[8] since taxing the former will alter behavior less for any given amount of revenue raised compared to taxing the latter. But despite the theoretical appeal of optimal taxation, it is not considered a particularly useful guide for tax policy in practice.[9] It employs differential tax rates

4 *See, e.g.*, Joel Slemrod & Jon Bakija, Taxing Ourselves: A Citizen's Guide to the Debate Over Taxes 120 (4th ed. 2008).

5 *Id.* at 120, "This outcome maximizes the well-being of participants in the market in the narrow sense of maximizing the amount by which total dollar-valued benefits exceed total dollar-valued costs, a situation economists describe as 'efficient.' "

6 *Id.*

7 Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 Cal. L. Rev. 1905, 1945 (1987); McCaffery, *supra* note 3, at 81; David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 Cornell L. Rev. 1627, 1655–56 (1999).

8 McCaffery, *supra* note 3, at 81.

9 Slemrod & Bakija, *supra* note 4, at 132 ("although the optimal tax principle is correct in theory, it runs into practical problems that make it not particularly useful as a guide to policy").

(with the highest rates imposed on necessities) and – given the uncertainty as to which goods have relatively price-elastic demand – is susceptible to pressure from special interest groups. This is why broad-based uniform taxation is considered a very good rule of thumb: it is likely to cause much less economic distortion and allow lower tax rates.[10]

b. Distributive Justice

Distributive justice has always been (and no doubt should be) a key tax-policy consideration.[11] Identifying the precise prescriptions of justice in the context of income taxation entails normative political deliberation beyond our current discussion.[12] What is significant for the purposes of this book is the underlying assumption regarding the role of tax in regard to distributive justice within states. In the past, taxation was implicitly perceived to be a cost people pay for the public goods they consume,

[10] *Id.*

[11] *See, e.g.*, Henry C. Simons, Personal Income Taxation 18–19 (1938) ("The case for drastic progression in taxation . . . must be rested on the case against inequality on the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely"); Murphy & Nagel, *supra* note 1, at 12. For examples of the discussion of distributive justice in recent academic literature, see Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 *Fordham L. Rev*. 1991 (2004); Brian Galle, *Tax Fairness*, 65 *Wash. & Lee L. Rev*. 1323 (2008); Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 *Chap. L. Rev*. 157, 195 (1999). For a review of the political history of taxing the rich, see Avi-Yonah, *supra* 3, at1409; J.J. Thorndike & D.J. Ventry, Tax Justice: The Ongoing Debate 30 (2002); for a review of the arguments supporting various schemes of distributive justice see David Duff, *Tax Policy and the Virtuous Sovereign: Dworkinian Equality and Redistributive Taxation*, *in* Philosophical Foundations of Tax Law, 167 (Monica Bhandari, ed., 2017).

[12] This is an issue that is too broad to be comprehensively addressed here. As Murphy and Nagel, *supra* note 1, at 73, summarize it,

> The values that bear on the assessment of public policy are very diverse, so there is much to disagree about. First, there are questions about the legitimate ends of public policy – whether they should be defined by collective self-interest, or the general welfare, or some conception of fairness, including equal opportunity. . . . Second, there are questions about the limits on the authority of the state over the individual, and whether property rights have any part in defining those limits, or whether they are mere conventions designed for other purposes. Third, there are questions about the proper role of responsibility and desert in the determination of people's economic rewards – and about what individuals can and cannot be held responsible for. Fourth, there are questions about the importance of equality of opportunity, and its relation to inherited economic inequality – and the broader question of what social causes of distributive inequality should be regarded as offensively arbitrary. Finally, there are questions about the importance of freedom of choice in economic life.

and the rationale of benefit taxation was widely supported.[13] In modern times, however, it has been commonly acknowledged that tax should be unlinked from the benefits a person receives from the state.[14] Instead, most commentators agree today that taxation and entitlement to public goods should be based on some function of social justice.

Under the currently prevailing view, tax should be allocated among individuals according to their ability to pay,[15] an approach that is broadly based on material well-being.[16] Underlying this approach is the idea that the state has grown so distinct and meaningful that it is no longer feasible or, more importantly, relevant to base people's tax obligation on the benefits they receive from the state. The duty to pay taxes is thus not based on the benefits one gets from the state but rather on a sense of civic identity.[17]

[13] Hobbes famously supported paying taxes in proportion to what people "consume" in society: "But when the impositions are laid upon those things which men consume, every man payeth equally for what he useth." THOMAS HOBBES, II LEVIATHAN 295 (A.P. MARTINICH & BRIAN BATTISTE eds., revised ed. 2010). For prominent support of the benefit principle in modern times, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY 315–16 (1960). Murphy & Nagel, *supra* note 1, at 16, note that "[m]any have thought that fairness in taxation requires that taxpayers contribute in proportion to the benefit they derive from government" and criticize the benefit principle as "inconsistent with every significant theory of social and economic justice," *id.* at 19.

[14] For a detailed account of the shift in the scholarship of American tax theorists such as Ely, Adams, and Seligman and their efforts to expose the anachronistic social theory that underpinned the benefit principle, *see* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, at 111–18 (2013).

[15] "The subjects of every state ought to contribute towards the support of the government, as nearly as possible in proportion to their respective abilities: that is, in proportion to the revenue which they respectively enjoy under the protection of the state." Smith, *supra* note 1, at 371. But *see* Murphy & Nagel, *supra* note 1, who argue that tax burdens should not be considered independently of the social system as a whole.

[16] *See, e.g.*, Richard A. Musgrave, *Ability to Pay*, THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 1 (2005). For an extensive review of the literature, see Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867 (2001–02).

[17] Ajay Mehrotra, *supra* note 14, at 113, cites Edwin Seligman in particular as "condemning the political theory that buttressed the benefits principle." He argued that the benefits doctrine was based, at its core, on an outmoded conception of citizenship:

> It is now generally agreed that we pay taxes not because the state protects us, or because we get any benefits from the state, but simply because the state is a part of us. The duty of supporting and protecting it is born with us. In a civilized society the state is as necessary to the individual as the air he breathes; unless he reverts to stateless savagery and anarchy he cannot live beyond its confines. His every action is conditioned by the fact of its existence. He does not choose the state, but is born into it; it is interwoven with the very fibers of his being; nay, in the last resort, he gives to it his very life. To say that he supports the state only because it benefits him is a narrow and selfish doctrine. We pay taxes not because we get benefits from the state, but because it is as much our

Though the exact meaning of ability to pay is vague and debatable, all its variants reflect the basic notion that taxpayers should pay their fair share (Mill's "equal sacrifice"[18]) in financing the public fisc based on their being equal members of the political community. Both the tax base (distribution of what)[19] and the tax rates (how much distribution)[20] are debatable in terms of tax justice. However, there is no question that the state is a key venue for ensuring justice[21] and that income taxation is a key tool (the *optimal* tool, some even argue[22]) for promoting distributive justice.

duty to support the state as to support ourselves or our family; because, in short, the state is an integral part of us. [footnote omitted] With these striking words, Seligman articulated visions of a new and revitalized sense of civic identity, one that went well beyond traditional social contract rationales to capture a citizen's "ability to pay," or what Seligman referred to as their taxpaying "faculty."

[18] The idea of equal sacrifice is attributed to J.S. Mill, The Principles of Political Economy with Some of Their Applications to Social Philosophy 485 (1866) ("all are thought to have done their part fairly when each has contributed according to his means, that is has made an equal sacrifice for the common object"). But *see* Murphy & Nagel's, *supra* note 1, at 20–25, opposition to equal sacrifice, indeed to vertical equity, on the basis that justice of tax burdens cannot be separated from the justice of the pattern of government expenditure.

[19] There are numerous interpretations as to what constitutes equal distribution in this context. Material well-being is certainly part of one's ability; however, distribution does not and should not focus on material well-being alone. Attributes such as health, physical state, family status, gender, prestige, quality of living, and level of education do not necessarily translate into material differences, yet they certainly affect people's well-being. *See* Amartya Sen, Inequality Reexamined 150 (1992); McCaffery, *supra* note 3, at 106 ("But modern tax systems go well beyond affecting the distribution of money. A consistent limitation of the utilitarian turn in tax theory, as we have seen above, has been to reduce questions of taxation to a single index of resources in a narrowly framed problem of distributive justice. But even if tax were only ever intended to be about such matters, all practical means of seeking distributive justice transcend the single index of wealth, to affect patterns of work, marriage, family, education, savings, investment, charity, and so on. Behaviors, lifestyles, family models, and various market actions are inevitably at stake."). *See* also Murphy & Nagel *supra* note 1, at 57 ("Apart from these very broad questions of social justice, which obviously bear on the way tax policy should relate to inequalities of wealth, disposable income, consumption, and earning power, the aim of avoiding arbitrary sources of inequality can have an influence on the more detailed design of public policy. In relation to taxes, it manifests itself in controversies over the fairness of differential tax treatment of persons with distinguishing characteristics who are in other ways economically comparable. The question arises with respect to savers and spenders, the married and the unmarried, people with children and people without, and so forth.").

[20] For the case for and against progressive taxation, *see* Avi-Yonah, *supra* note 3, at 1399–1410.

[21] As Thomas Nagel in *The Problem of Global Justice*, 33 *Phil. & Pub. Aff.* 113, 130 (2005), puts it, "The state makes unique demands on the will of its members . . . and those exceptional demands bring with them exceptional obligations, the positive obligations of justice."

[22] *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994).

c. *Identity*

The importance of these two classic normative considerations in income tax policy cannot be overstated. They do not, however, exhaust the normative underpinnings of tax. Tax is also a powerful social instrument that plays a significant part in the construction of people's personal and collective identities.[23] It both reflects and shapes how people perceive themselves and others. It influences how people interact with others in various contexts, including within their families and communities, and it affects their sense of social solidarity and modes of participation in social institutions.[24] Income tax law reflects and simultaneously shapes a certain vision of the self. When, for example, income taxation acknowledges certain differences (e.g., one's ability to pay, marital status, or business-travel expenses) while disregarding others (e.g., one's disability, common-law status, or commuting and childcare expenses), it reinforces a certain conception of the taxpayer and undermines the alternatives. In so doing, it draws on an image of an archetypical individual taxpayer but, at the same time, shapes that image.[25] If we assume the archetypical taxpayer to be healthy, married, childless, or living near his or her workplace, for example, we exclude those who are disabled, single, have children, or live at a distance from their workplace. Moreover, it is not only the specific contents of tax's rules that affect identities but also the way in which tax operates. Tax inevitably compares people and their behavior on a monetary scale, equating them to market transactions. The infiltration of the market nexus into the sphere of human attributes and interactions commodifies them. They are valued through the narrow and reductive prism of the market valuation, affecting, in turn, their meanings.[26]

[23] *See, e.g.*, McCaffery, *supra* note 3, at 106 (1996). For a more detailed discussion of this argument, *see* Tsilly Dagan, *The Currency of Taxation*, 84 Fordham L. Rev. 2537 (2016).

[24] McCaffery, *supra* note 3, at 85:

> The critical problem is that tax is not just about the distribution of resources. Real-world tax systems affect a wide range of behaviors and diverse patterns of work and lifestyle: taxes affect decisions to marry, to have children, to become one- or two-earner families, to pursue education, to support charities, to save for retirement, to make inter-generational gifts or bequests, and so on. These are or, at least can be matters of principle. We could readily adapt Rawls's words to tax, once we fully understand its reach: "[T]hese institutions can have decisive long-term social effects and importantly shape the character and aims of the members of society, the kinds of persons they are and want to be."

[25] See Tsilly Dagan, *Commuting*, 26 Va. Tax Rev. 185 (2006).

[26] For a more detailed explanation of this claim, *see* Tsilly Dagan, *Itemizing Personhood*, 29 Va. Tax Rev. 93 (2009).

Significantly, tax's impact goes beyond the expressive dimension, for its effect on taxpayers' incentives has real-life consequences. It can shape not only taxpayers' perceptions of themselves and of others but also their choices and modes of action (to live at a distance from work, to work outside of the home, or to be a homemaker). Assuming enough taxpayers alter their choices, social meanings can change as can social norms. As a result, tax can affect the ways in which taxpayers function within their families, communities, and workplaces. Moreover, the makeup, size, and nature of the communities formed by taxpayers and the social institutions they construct can transform as well. The changes in the functioning of individuals and the nature of their communities could, in turn, reinforce people's choices, social meanings, and norms.

The conversion of life into the explicit or implicit currency of taxation is neither a neutral nor technical process and involves a considerable amount of normative (often implicit) choices. In addition to tax's traditional efficiency and distributive criteria, policymakers must thus consider its possible effects on taxpayers' personal and collective identities. Accordingly, a comprehensive analysis of income taxation must take into account the less traditional notions of identity and community alongside the traditional goals of efficiency and distributive justice.

Finally, not only social communities but also political communities are affected by taxation. As being the state's chief source of funding as well as a key issue of concern for voters everywhere, tax is one of the most prominent manifestations of civic participation in democratic societies. As implied by the famous call for "no taxation without representation," there are strong links (at least perceived) between the duty to pay taxes and having a voice in the political process.[27] Being a member of the state

[27] *See* Ruth Mason, *Citizenship Taxation*, 89 S. Cal. L. Rev. 169, 189–92 (2015) (reviewing and criticizing the link between the right of non-resident U.S. citizens to vote in U.S. elections and their duty to pay taxes to the United States); Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. Rev. 443, 480–84 (2007) (supporting the taxation of citizens, even if residing abroad, by explaining their belongingness to the national community). For a comprehensive analysis of tax policy, democracy, accountability, and legitimacy in the international tax context, *see* Diane M. Ring, *What's at Stake in the Sovereignty Debate? International Tax and the Nation-State*, 49 Va. J. Int'l L. 155 (2008). For a discussion of the link between the duty to pay taxes and having a voice in the political process in the context of the EU after the 2008 crisis, *see* Ana Paula Dourado, "Chapter 10: No Taxation without Representation in the European Union: Democracy, Patriotism and Taxes" in Cécile Brokelind (ed.), "Principles of Law: Function, Status and Impact in EU Tax Law" (IBFD, 2014). For some examples of the intricate links between taxation and democratic participation, *see* Saul Levmore, *Taxes as Ballots*, 65 U. Chi. L. Rev. 387 (1998); Nancy