

# POPULISM AND TAXATION

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## ABSTRACT

*This Article explores the presence of populism in the field of law, specifically focusing on U.S. federal taxation. While discussions on populism typically revolve around politics, this Article highlights its occurrence in tax law. This includes the use of populist rhetoric in tax discussions as well as the inclusion of populist code sections in the federal tax system, resulting in substantial tax expenditures that are often overlooked. These populist elements go beyond the behavioral preferences or biases of political players.*

*The problem with populism in tax law is multi-faceted. First, it oversimplifies the discussion, preventing a comprehensive understanding of the real issues and viable solutions. The complexities inherent in tax-related matters cannot be adequately addressed through populist statements alone; a more thorough analysis is required to find effective solutions.*

*A detailed examination of this concern reveals a substantial body of evidence demonstrating how misconceptions shaped by populism influence voter preferences regarding tax policy. These misconceptions also impact politicians, leading to campaign promises and initiatives related to tax policies. Furthermore, interest groups can exploit this confusion to advance their agendas, which poses a significant risk.*

*Overall, this Article argues that the presence of populism in tax law is problematic due to its oversimplification of complex issues, influence on voter preferences and political decisions, and susceptibility to manipulation by interest groups. This Article recommends incorporating a mandatory step in the legislative process to empower the committee responsible for discussing bills. This step would equip the committee with better tools to effectively perform their duties. Additionally, this Article recommends that the economic implications of proposed legislation be made publicly accessible. Further, this Article suggests the implementation of an additional review process after a fixed term and prioritization of discussions on tax policy around its primary objective: generating tax revenue. This shift in focus will result in more economically grounded, evidence-based, and efficient tax law discussions. In summary, these recommendations aim to improve the legislative process, encourage media scrutiny, and foster economically driven tax policy discussions while ensuring the temporary nature of certain tax measures unless they prove effective or gain broad bipartisan support.*

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## INTRODUCTION

Most conversations surrounding populism primarily concentrate on politics. However, this Article identifies a parallel occurrence within the realm of law: the use of populism in the context of U.S. federal taxation. Whether it is the use of populist rhetoric in tax discussions or populist code sections in the federal tax system, populism in tax law leads to significant tax expenditures that, for the most part, are being ignored and that go beyond the behavioral preferences of political players.<sup>1</sup>

The problem with populism in tax law is multifaceted. First, it reduces the discussion to an overly simplistic level; it never truly identifies the real issues and the solutions to the problems, mostly because the issues are far more complicated than the populist statements make those to be, or that it requires a much more in-depth analysis, to find the right solution. Kathleen DeLaney Thomas and Erin Schraff explain the public's misunderstanding of the tax system:

The public misunderstands many aspects of the tax system. People misunderstand how marginal tax rates work, misperceive their own average tax rates, and believe they benefit from tax deductions for which they are ineligible. These misunderstandings can be significant. For example, surveys taken in the early 2000s revealed that many people thought the estate tax applied broadly even though only a tiny fraction of taxpayers—about 2% at the time—would face it. Such confusion is understandable given the complexity of our tax system.<sup>2</sup>

An in-depth review of such concern reveals that there is a significant body of evidence that explains how such misconceptions shape voter preferences about tax policy, impact the politicians (lead to campaign election promises), shape tax policy initiatives, and are manipulated by interest groups who may exploit this confusion to advance their interests.<sup>3</sup>

Second, when populist policies intersect with the U.S. federal tax law, it can cause economic distortions, inefficiency, significant loss of revenues, and unnecessary complications. As DeLaney Thomas and Schraff explain:

People are averse to taxes. As the literature on tax aversion suggests, however, this does not merely mean that people dislike taxes but also that people respond to taxes in economically irrational ways. For example, in one study, subjects expressed strong preferences for tax-exempt bonds over taxable bonds, even when the after-tax return on the taxable bond was the same as the return on the tax-exempt bond. In other words, as between two economically identical investments, people displayed a strong preference for the tax-exempt investment when economically rational actors would be neutral between these choices. Commentators have suggested this tendency motivates suboptimal investment behavior in the real world, such as low-bracket

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<sup>1</sup> Reuven S. Avi-Yonah & Kaijie Wu, *Behavioral Biases and Political Actors: Three Examples from US International Taxation*, in BEHAVIOURAL PUBLIC FINANCE 80, 81 (M. Mustafa Erdoğan et al. eds., 2021).

<sup>2</sup> Kathleen DeLaney Thomas & Erin Scharff, *Fake News and the Tax Law* 80 WASH. & LEE L. REV. 803, 806 (2023).

<sup>3</sup> *Id.* at 825; Mayling Birney, Ian Shapiro & Michael J. Graetz, *The Political Uses of Public Opinion: Lessons from the Estate Tax Repeal*, in DIVIDE AND DEAL: THE POLITICS OF DISTRIBUTION IN DEMOCRACIES 298, 315 (Ian Shapiro et al. eds., 2008).

taxpayers investing in tax-exempt bonds when they could earn a better return with taxable bond.<sup>4</sup>

The tax code's complexity and economic misunderstanding of most Americans have contributed to the spreading of false information, which makes it even more difficult for fact-checking journalists to reveal inaccurate facts shared by politicians, explain it to the public, or offer a way to ameliorate the economic distortions, inefficiencies, and unnecessary complications.

Finally, populism may cause decision-makers to keep or extend rules that should be repealed, amended, or phased out.

Taxation is central to how the members of a democratic state experience their participation in the democratic community. For many people in the United States, paying taxes is their only direct interaction with the federal government each year. Tax policy also plays a role in how we delineate—in popular understanding, and legally—who is included in the democratic community as citizens. Tax rules have the power to affect individuals in ways that are fundamental to their functioning as part of the democratic polity. They also affect the structure and efficacy of a wide variety of political and advocacy associations that shape democratic governance. Taxes can expand the political community and ensure the full benefits of citizenship. Because taxes can directly threaten the political advantages of wealthy elites, efforts to prevent taxation often align with efforts to dismantle democratic accountability.<sup>5</sup>

In essence, using populist rhetoric to describe tax policy or tax issues often perpetuates and immortalizes the problems in our federal tax system. As such, it threatens the public's confidence in its democratic institutions and the social order within society. Recently, Professor Peter N. Salib proposed employing the tax code to reduce the skyrocketing rate of gun deaths in the United States and stymie the spread of viral fake news stories designed to undermine our elections.<sup>6</sup> Salib suggested this could be achieved through tax legislation that would require people to bear the social costs of their activities, rather than forcing this upon the society as a whole.<sup>7</sup> This Article proposes a different angle.

This Article begins with an Introduction, which serves as an opening and a prelude. Then, Part I reviews the meaning of the term “populism,” its history in the modern era, and the evolution of populism over the last one hundred years. Even though the literature on populism does not follow a single definition, it may be argued that populism refers to the invocation of “the people” who are betrayed, wronged, or otherwise left vulnerable to forces outside their control and take advantage of public illiteracy. Part II focuses on the common populist characteristics that can be found in conversations regarding the U.S. federal tax system. Part III provides several examples of populist statements made by several American politicians and

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<sup>4</sup> DeLaney Thomas & Scharff, *supra* note 2, at 809–10, 810 n.19.

<sup>5</sup> Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy*, 83 OHIO ST. L.J. 471, 506–07 (2022).

<sup>6</sup> Peter N. Salib, *The Pigouvian Constitution*, 88 U. CHI. L. REV. 1081, 1081 (2021).

<sup>7</sup> *Id.*

shows how those statements fit into the definitions of populism and populist characteristics. Part IV analyzes several key tax provisions and demonstrates how populism found its way into the U.S. federal tax system and how those provisions fail to achieve the goals of taxation and the goals of the provisions themselves. Part V analyzes the different frameworks in Congress regarding tax expenditures and shows that these are not as effective as one would hope. Part VI offers several recommendations that would improve the efficiency of the U.S. federal tax system. The Conclusion summarizes the main issues and recommendations discussed.

## I. WHAT IS POPULISM?

Though the word itself is used often and in many different contexts, to better understand the issue of populism in the U.S. federal tax system, one first needs to fully understand the term “populism”—its meaning, history, and evolution. This Part will explain this term and will provide helpful context for the issues discussed later in this Article.

### A. THE MEANING OF POPULISM

Most academic discussions around “populism” rely almost entirely on daily stories and everyday uses of this term. These uses are often applied to any person or movement that makes statements appealing to the masses and, in doing so, betraying, misleading, or otherwise leaving them vulnerable to forces outside their control. It undermines the fundamental confidence in the social order by questioning the operation of democratic institutions for not fulfilling their functions and offering new partial mechanisms that would ensure the desired outcomes.<sup>8</sup>

Nevertheless, populism is hard to define,<sup>9</sup> and scholars have different definitions of populism.<sup>10</sup> As a result, there is often a debate over whether particular political movements, statements, or leaders are truly populists. Though there is no single definition of populism that is universally accepted,<sup>11</sup> most would agree that populism is a complex and multifaceted phenomenon.<sup>12</sup> One can find “populists” in almost every area of life, and in almost every political agenda, whether it is “left,” “right,” or “center.”<sup>13</sup> However, most populist arguments or statements will try to appeal to the intended audience’s perspective, not challenge it.<sup>14</sup>

Margaret Canovan—an English political theorist who is considered to be one of the most influential voices in the research of populism—considered

<sup>8</sup> Robert S. Jansen, *Populist Mobilization: A New Theoretical Approach to Populism*, 29 SOCIO. THEORY 75, 76 (2011).

<sup>9</sup> *Id.*

<sup>10</sup> Rafał Riedel, *Populism and Its Democratic, Non-Democratic, and Anti-Democratic Potential*, 199 POLISH SOCIO. REV., 287, 288 (2017).

<sup>11</sup> See Margaret Canovan, ‘People’, *Politicians and Populism*, 19 GOV’T & OPPOSITION 312, 313 (1984).

<sup>12</sup> Andrew Arato, *Political Theology and Populism*, 80 SOC. RSCH. 143, 156 (2013); see also Ernesto Laclau, *POLITICS AND IDEOLOGY IN MARXIST THEORY: CAPITALISM, FASCISM, POPULISM* 143 (1977) (“[F]ew [terms] have been defined with less precision. We know intuitively to what we are referring when we call a movement or an ideology populist, but we have the greatest difficulty in translating the intuition into concepts.”); Jansen, *supra* note 8, at 78.

<sup>13</sup> Canovan, *supra* note 11, at 313–14. See also Riedel, *supra* note 10.

<sup>14</sup> Margaret Canovan, *Two Strategies for the Study of Populism*, 30 Pol. Stud. 544, 544 (1982); MARGARET CANOVAN, *POPULISM* 294–98 (1981) [hereinafter CANOVAN, *POPULISM*].

populism to be a moralized discourse that pits a virtuous and homogeneous people against a corrupt elite.<sup>15</sup> However, scholars criticized it<sup>16</sup> and argued that this definition was too broad, did not adequately distinguish populism from other political ideologies, and could also be applied to other political movements—such as nationalism or socialism—even though they may not be populists. Also, Ernesto Laclau, an Argentinian political theorist and philosopher, argues that Canovan's definition of populism is overly essentialist because it presupposes that populism is a fixed and immutable ideology.<sup>17</sup> Laclau argues that populism is a more fluid phenomenon that can take on different forms depending on the context.<sup>18</sup>

Chantal Mouffe, a Belgian political theorist, defines populism as a political strategy that aims to create a division between an “us” and a “them.”<sup>19</sup> Benjamin Moffitt, an Australian political theorist, argues that populism is not a fixed ideology, but rather a flexible political tool that can be used both by the “left” and the “right.”<sup>20</sup> Mouffe's definition of populism is based on Laclau's work, who argues that populism employs a rhetorical tactic that establishes a political boundary between “the people” and “the adversary,” who they—“the people”—often see as “the enemy.”<sup>21</sup> “The people” are often characterized as individuals who lack influence and authority and are sometimes excluded or barred from power; whereas “the enemy” is identified as a group who are perceived to be accountable for the marginalization of the people and their exclusion from power.<sup>22</sup> Jan-Warner Müller, a German political philosopher, added to the discussion about populism, stating that populists “are always anti-pluralist.”<sup>23</sup> Populists claim that they, and they alone, represent the people, and that the people are a cohesive entity.<sup>24</sup>

In this context, it should be noted that Mouffe and other political theorists, such as Laclau, argue that populism is an essential feature of democracy,<sup>25</sup> and does not necessarily have to be a negative force or strategy;

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<sup>15</sup> CANOVAN, POPULISM, *supra* note 14, at 242. See also Daniele Albertazzi & Duncan McDonnell, *Introduction: The Sceptre and the Spectre in TWENTY-FIRST CENTURY POPULISM: THE SPECTRE OF WESTERN EUROPEAN DEMOCRACY* 1, 3 (Daniele Albertazzi & Duncan McDonnell eds., 2008) (describing populism as “an ideology which pits a virtuous and homogeneous people against a set of elites and dangerous ‘others’ who are together depicted as depriving (or attempting to deprive) the sovereign people of their rights, values, prosperity, identity and voice”). The notion regarding the “corrupt elites” in this context is a relatively common saying, see for example Riedel, *supra* note 10 at 291.

<sup>16</sup> See e.g., Cas Mudde, *Populism: An Ideational Approach*, in *THE OXFORD HANDBOOK OF POPULISM* 27, 29 (Cristóbal Rovira Kaltwasser et al. eds., 2017).

<sup>17</sup> ERNESTO LACLAU, ON POPULIST REASON 144–45 (2005).

<sup>18</sup> *Id.*

<sup>19</sup> David Klemperer, *Interview: Chantal Mouffe on democracy, populism, and why the Left needs to read Spinoza*, TOQUEVILLE 21 (Aug. 19, 2021), <https://tocqueville21.com/interviews/interview-chantal-mouffe-on-democracy-populism-and-why-the-left-needs-to-read-spinoza/> [<https://perma.cc/PMS3-MEPZ>].

<sup>20</sup> Benjamin Moffitt & Simon Torney, *Rethinking Populism: Politics, Mediatization and Political Style*, 62 POL. STUD. 381, 392 (2014). See also CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* (3d ed. 2005).

<sup>21</sup> Samuele Mazzolini, *Populism and Hegemony in Ernesto Laclau. Theory and Strategy in the Italian Communist Party and the Ecuadorian Citizens' Revolution* 3, 22 (May 2018) (Ph.D. thesis University of Essex) (on file with Università Ca' Foscari Venezia).

<sup>22</sup> See generally LACLAU, *supra* note 18, at 85–100.

<sup>23</sup> Eric S. M. Protzer, *Social Mobility Explains Populism, Not Inequality or Culture* (Crt. Int'l Dev. at Harv. U., Working Paper No. 118, 2019).

<sup>24</sup> JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 3 (2016).

<sup>25</sup> Deereus, Thomas & Matthias Lievens, *Hegemony and the Radicalisation of Democracy: An Interview with Chantal Mouffe*, 73 TIJDSCHRIFT VOOR FILOSOFIE 4 (2011) 677, 680–81.

rather, it can be found in almost every political idea or ideology.<sup>26</sup> It can sometimes be used as a positive force as, for instance, it can help organize and rally the people and challenge the status quo. However, very often populism is used dangerously, as it may lead to the exclusion of minorities<sup>27</sup> and the erosion of democratic institutions.<sup>28</sup> Perhaps this is also why populist leaders often argue, in one way or another, that power was taken from and should now be returned to the people.<sup>29</sup>

Further, populism will always present a Manichean conflict:<sup>30</sup> a conflict between two opposing forces that are seen as fundamentally different and irreconcilable. Hence, populist leaders and statements will always represent “the people” against some version of corrupted “elites” and will claim to be protecting “the people” from those “out-of-touch” establishments or individuals that are part of “the elite,” in an attempt to deny the legitimacy of those individuals or institutions opposing the populists.<sup>31</sup>

Last, an important development in the study of populism for the context of this Article is an idea developed by Robert Jansen—a comparative-historical sociologist—that populism is not a movement, political party, regime, or ideology (whether political or other); it is a political strategy.<sup>32</sup> Jansen suggests that populism does not offer any meaningful social content or agenda but is essentially a means to an end, he refers to it as “populist mobilization.”<sup>33</sup> In the context of this Article, this development in the research of populism is critical because, as the examples used in Parts III and IV will show, there is often a disparity between the statements made by the politicians and the outcomes of the federal tax laws they support.

In summary, the most common elements in the definition of “populism” include: (1) populism is a political ideology that contrasts a morally upright and unified populace with a corrupt elite; (2) populists often use anti-establishment rhetoric and appeal to the emotions of the people; (3) populism

<sup>26</sup> Riedel, *supra* note 10.

<sup>27</sup> See Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 288 (2021). The authors explain:

Think for instance of the slogans “Black lives matter” and “all lives matter.” The former insists on the value of a group marginalized in political practice, seeking to bring an excluded participant into the political fold. The latter also sounds inclusionary because it encompasses “all lives.” But in context it erases the way that Americans’ experiences of state power differ in racialized ways. The universality of “all lives matter” excludes those groups whose lives have, in practice, mattered less to the systems they address. In the same way, claims to represent “the people” falter on the fact that a diverse democracy has no one, unified “the people.” Claiming it does thus exclude experiences, views, and statuses that populists present as falling outside “the people” proper—as, in fact, mattering less.

<sup>28</sup> Patrick Liddiard, *Is Populism Really a Problem for Democracy?*, 3 (Woodrow Wilson Int’l Ctr. for Scholars, Hist. & Pub. Pol’y Program, Occasional Papers, 2019) [https://www.wilsoncenter.org/sites/default/files/media/documents/publication/liddiard\\_is\\_populism\\_really\\_a\\_problem\\_for\\_democracy\\_august\\_2019\\_0.pdf](https://www.wilsoncenter.org/sites/default/files/media/documents/publication/liddiard_is_populism_really_a_problem_for_democracy_august_2019_0.pdf) [https://perma.cc/78S3-ARJ3]; LACLAU, *supra* note 18; MÜLLER, *supra* note 24, at 6; see also Bernstein & Staszewski, *supra* note 27, at 288–89 (“Populist leaders claim special access to the people’s will, which democratic institutions allegedly miss, ignore, or distort.”).

<sup>29</sup> MÜLLER, *supra* note 24, at 76–77.

<sup>30</sup> Andreas Schedler, *Again, What is Populism?*, REV. OF DEMOCRACY (Feb. 2024), <https://revdem.ceu.edu/2024/02/01/again-what-is-populism/> [https://perma.cc/D3PH-ELHL]; The term originates from “Manichaeism,” which was a religious movement that emerged in Persia in the 3rd century CE. According to Manichaeism the universe is a battleground between two inherently opposing forces: the forces of light and the forces of darkness. The forces of light are seen as good, while the forces of darkness are seen as evil.

<sup>31</sup> Aziz Z. Huq, *The People Against the Constitution*, 116 MICH. L. REV. 1123, 1133 (2018).

<sup>32</sup> Jansen, *supra* note 8, at 81–82.

<sup>33</sup> *Id.* at 82.

can be found on the left, the right, and the center of the political spectrum; (4) populism can be a force for positive or negative outcomes. Populism can mobilize individuals and facilitate beneficial transformations, yet it can also be utilized to target minority groups and incite violence.

## B. THE MODERN HISTORY OF POPULISM

The roots of modern populism can be traced back to the late nineteenth century and characterized by the emergence of various populist movements in Europe and North America. These movements—predominantly agrarian—garnered support from the working class and impoverished segments of society. They frequently denounced what they saw as corruption prevalent among the elite and advocated for comprehensive economic and social reforms.

Among the notable populist movements of the late nineteenth century was the People's Party in the United States.<sup>34</sup> Established in the 1890s, the People's Party swiftly garnered support from economically distressed and troubled farmers and workers and emerged as a political force in the United States.<sup>35</sup> The Party, which was founded on the principles of economic equality and social justice, quickly gained support from farmers, laborers, and other marginalized groups.<sup>36</sup> The People's Party advocated for several key reforms, including the nationalization of railroads and telegraphs, the implementation of a progressive income tax system, and the direct election of senators.<sup>37</sup>

One of the most important aspects of the People's Party was its ability to build coalitions between different groups. The Party was able to unite southerners and westerners, farmers and laborers, and people from different races.<sup>38</sup> This was a significant achievement, as these groups had often been divided by race, class, and region.<sup>39</sup> The People's Party was able to build these coalitions by appealing to the common interests of these groups. For example, both southerners and westerners were struggling with debt-ridden economies.<sup>40</sup> Farmers and laborers both shared a common role as producers. While blacks and poor whites in the South often faced similar economic circumstances.<sup>41</sup>

However, the People's Party faced significant challenges in the late-nineteenth-century South. The region was still reeling from the Civil War, and there was a strong sense of sectionalism. Additionally, there was a rivalry

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<sup>34</sup> Charles Postel, *American Populism, 1876-1896*, N. ILLINOIS UNIV. DIGIT. LIBR., <https://digital.lib.niu.edu/illinois/gildedage/populism> [<https://perma.cc/VM6C-7MEW>] (last visited Apr. 3, 2024).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Worth Robert Miller & Stacy G. Ulbig, *Building a Populist Coalition in Texas, 1892-1896*, 74 J.S. HIST. 255, 256-57 (2008). See also Rebecca Edwards, *The Populist Party, 1896: A VASSAR COLLEGE WEBSITE* (2000), <https://perma.cc/7ZJH-4S5G> <http://projects.vassar.edu/1896/populists.html> [<https://perma.cc/WC9K-2TSB>]; *The People's Party*, STUDY SMARTER, <https://www.studysmarter.us/explanations/history/us-history/the-peoples-party/> [<https://perma.cc/WJ7H-PNAQ>] (last visited Sept. 25, 2023); *People's Party*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/peoples-party> [<https://perma.cc/4MED-F3ZQ>] (last visited Sept. 23, 2023).

<sup>38</sup> See Postel, *supra* note 34.

<sup>39</sup> Miller & Ulbig, *supra* note 37, at 255-56.

<sup>40</sup> See Postel, *supra* note 34.

<sup>41</sup> Miller & Stacy G. Ulbig *supra* note 37.

between rural and urban areas, and racism was still a major problem.<sup>42</sup> Despite these challenges, the People's Party achieved considerable success in Texas.<sup>43</sup> In 1892, the party's candidate for governor, James Hogg, won the election, and in 1894, the party won control of the state legislature.<sup>44</sup> The Party's success in Texas was a major turning point in American politics.<sup>45</sup> The party's message of economic equality and social justice resonated with many Americans, and it helped to lay the foundation for future progressive movements.<sup>46</sup> Despite the People's Party falling short of capturing the presidency, its influence on American politics was substantial.<sup>47</sup> The party's platform played a pivotal role in shaping the agenda of the Democratic Party while also raising awareness about the challenges confronted by farmers and workers.<sup>48</sup> Although not victorious in the presidential race, the People's Party left a lasting impact on political discourse and policy discussions in the United States.<sup>49</sup>

In the early twentieth century, populism witnessed a resurgence alongside the emergence of movements like fascism and Nazism. These movements, characterized by their nationalist and authoritarian nature, capitalized on the anxieties and biases of the populace. They frequently targeted minorities and immigrants as scapegoats, while advocating the use of violence to accomplish their objectives.<sup>50</sup>

In the aftermath of World War II, populism experienced a decline. Towards the end of the Cold War, there was a prevailing belief that liberal constitutional democracy would inevitably secure a lasting triumph over alternative governance models.<sup>51</sup> However, in the late-twentieth and early-twenty-first centuries, populism underwent a resurgence. This revival can be attributed to various factors, including economic inequality, globalization, and the ascent of social media as influential platforms.<sup>52</sup>

Economic inequality has been a major factor in the rise of populism.<sup>53</sup> In recent decades, the gap between the rich and the poor has widened in many countries. This has led to a sense of resentment among the working class and the poor who feel that they are being left behind. Similarly, globalization has also contributed to the rise of populism. Globalization led to the movement of jobs and capital around the world, which displaced workers in developed countries. This led to a sense of insecurity and anxiety among the working class who feel that their jobs are being threatened. No less important is the

<sup>42</sup> *Id.*

<sup>43</sup> Donna A. Barnes, *People's Party*, TEXAS STATE HIST. ASS'N (Jan. 8, 2021), <https://www.tshaonline.org/handbook/entries/peoples-party> [<https://perma.cc/5YHL-HSWM>].

<sup>44</sup> *Id.*

<sup>45</sup> See Postel, *supra* note 34.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See Edwards, *supra* note 37; ENCYCLOPEDIA.COM, *supra* note 37.

<sup>50</sup> See generally CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 1–20 (2d. ed. 2017); YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT 212–13 (2018); Rogers Brubaker, *Why Populism?*, 46 THEORY & SOC'Y 357, 372 (2017); Cas Mudde & Cristóbal Rovira Kaltwasser, *Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America*, 48 GOV'T & OPPOSITION 147, 149 (2013).

<sup>51</sup> Bernstein & Staszewski, *supra* note 27, at 286 (“[T]here are no serious ideological competitors left to liberal democracy.”) (citing Aziz Z. Huq, *The People Against the Constitution* 116 MICH. L. REV. 1123 (2018)).

<sup>52</sup> MUDDE & KALTWASSER, *supra* note 50; MOUNK, *supra* note 50, at 144.

<sup>53</sup> Sergei Guriev, *Economic Drivers of Populism*, 108 AEA PAPERS & PROC. 200, 202 (2018).



rise of social media, which has also played an important role in the rise of populism. Social media platforms allow people to connect with others who share their views, and they can also be used to spread misinformation and propaganda.<sup>54</sup> This has made it easier for populist leaders to mobilize their supporters and to spread their message.

Populism is a complex phenomenon, and there is no single explanation for its rise. However, the factors discussed in this part have all played a role in its resurgence in recent decades.

### C. THE EVOLUTION OF POPULISM

Over the past century, populism has undergone notable transformations, particularly in the communication strategies employed to connect with “the people.” Previously, populists heavily relied on conventional media outlets like newspapers and television to disseminate their message.<sup>55</sup> However, in recent times, there has been a significant shift as populists increasingly harness social media platforms to engage a broader audience.<sup>56</sup> This shift has enabled populists to circumvent traditional media outlets and establish direct communication channels with their supporters.<sup>57</sup>

Another notable change lies in how populists shape their message. Historically, populists predominantly emphasized economic concerns, such as income inequality and unemployment. However, in recent times, there has been a growing emphasis among populists on social issues, such as immigration and national security.<sup>58</sup> This shift in focus has enabled populists to broaden their appeal and resonate with wider audiences,<sup>59</sup> as in recent years there was a rise in immigration and national security issues in many areas of the world.<sup>60</sup>

Lastly, populists have exhibited a greater level of sophistication in their rhetorical tactics. In the past, populists relied on straightforward, emotive language to resonate with “the people.”<sup>61</sup> However, in recent times, populists have honed their ability to employ intricate language and persuasive arguments to sway the sentiments of their audience.<sup>62</sup> This enhanced rhetorical skill has contributed to the expansion of their following, as populists have effectively reached and engaged a broader base of supporters.

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<sup>54</sup> See Bolane Olaniran & Indi Williams, *Social Media Effects: Hijacking Democracy and Civility in Civic Engagement in RHETORIC, POLITICS, & SOCIETY* 77 (Jones & Trice eds., 2020); Ralph Schroeder, *Digital Media and the Rise of Right-Wing Populism in SOCIAL THEORY AFTER THE INTERNET: MEDIA, TECHNOLOGY, AND GLOBALIZATION* 60 (UCL Press, 2018); Majid Khosravini, *Right Wing Populism in the West*, 19 *INSIGHT TURKEY* 53 (2017).

<sup>55</sup> Schroeder, *supra* note 54.

<sup>56</sup> Laura Jacobs, *Social media: populists' partners in crime*, THE LOOP, <https://theloop.ecpr.eu/social-media-populists-partners-in-crime/> [<https://perma.cc/KA74-UED3>].

<sup>57</sup> MUDDE & KALTWASSER, *supra* note 50, at 15; MÜLLER, *supra* note 50, at 144.

<sup>58</sup> PIPPA NORRIS & RONALD F. INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* 24 (2019).

<sup>59</sup> *Id.* at 10; see also Cas Mudde, *Introduction to the Populist Radical Right*, in *THE POPULIST RADICAL RIGHT: A READER* 1, 5, 8 (Cas Mudde ed. 2017).

<sup>60</sup> These changes occurred as a result of natural disasters, wars, and immigration trends. See NORRIS & INGLEHART, *supra* note 58, at 16.

<sup>61</sup> Cas Mudde, *The Populist Zeitgeist*, 39 *GOV'T & OPPOSITION* 541, 542 (2004).

<sup>62</sup> Jan Jagers & Stefaan Walgrave, *Populism as Political Communication Style: An Empirical Study of Political Parties' Discourse in Belgium*, 46 *EUR. J. POL. RSCH.* 319, 321–25 (2005); see also BENJAMIN MOFFITT, *THE GLOBAL RISE OF POPULISM: PERFORMANCE, POLITICAL STYLE, AND REPRESENTATION* 4–6 (2016).

The evolution of populism over the past century has elevated its influence as a formidable political force.<sup>63</sup> Populists now possess the capability to reach broader audiences and employ more refined, persuasive strategies. Consequently, traditional political parties face heightened challenges in competing with populists, and they grapple with the task of effectively countering their appeal and engaging a diverse electorate. It is important to note that not all populists are the same and there are a variety of different populist movements, often with different goals and objectives.<sup>64</sup> However, all populist movements share some common characteristics, such as a focus on the people and a distrust of the elite.<sup>65</sup>

#### D. DIFFERENT CLUSTERS OF POPULISM

The literature classified the following five different patterns of populism: (1) authoritarian populism; (2) libertarian populism; (3) exclusionary populism; (4) xenophobic populism; (5) electoral populism; and (6) nostalgic populism.<sup>66</sup>

The first type of populism is referred to as “authoritarian populism,” which is carried on through “transgressive strongman leaders.”<sup>67</sup> These charismatic leaders are not afraid to spread fake news in defending “traditional values and beliefs,” which generally gains massive support from the traditional population who are concerned that their society is changing and abandoning its culture and tradition.<sup>68</sup>

Authoritarian populism tends to perceive legal rules and constitutional norms as obstacles to the swift exercise of authority, and resort to illiberal tactics that can lead to democratic deconsolidation if this approach is entertained for too long by the political mainstream even adds that “strongmen populists” may also occasionally resort to the use of “performative violence” to demonstrate political will and domestic strength.<sup>69</sup>

Authoritarian populism attempts to support blue-collar employees by offering job security and fair pay. In doing so, authoritarian populism perceives legal rules as obstacles to exercising their authority, possibly resulting in democratic deconsolidation.<sup>70</sup>

<sup>63</sup> MUDDE & KALTWASSER, *supra* note 61.

<sup>64</sup> See e.g., Margaret Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 POL. STUD. 2, 2–16 (1999).

<sup>65</sup> Mudde, *supra* note 59.

<sup>66</sup> Jean-Paul Gagnon, Emily Beausoleil, Kyong-Min Son, Cleve Arguelles, Pierrick Chalaye & Callum N. Johnston, *What is Populism? Who is the Populist?*, 5 DEMOCRATIC THEORY v, vii (2018).

<sup>67</sup> Michael Allen, (2023). *The Logic of Populism and the Politics of the Strongman in* ENCYCLOPEDIA OF NEW POPULISM AND RESPONSES IN THE 21ST CENTURY (Chacko Chennattuserry, J., Deshpande, M., Hong, P. eds. 2023). See also, Ben Davies, Carola Leicht, & Dominic Abrams, *Donald Trump and the rationalization of transgressive behavior: The role of group prototypicality and identity advancement*, 52 J. of Applied Social Psychology 481 (2022).

<sup>68</sup> Bram Spruyt, Gil Keppens, & Filip Van Droogenbroeck, *Who Supports Populism and What Attracts People to It?*, 69 POL. RSCH. Q. 335, 336–38 (2016). “Traditional population” refers to populations who have lived in a particular region for generations, often maintaining cultural practices, languages, and lifestyles that have been passed down through history. These populations often have a deep connection to their land and environment, and their ways of life can include traditional knowledge, customs, and social structures that differ significantly from those of more modern or industrialized societies. The term can also imply a certain continuity and preservation of cultural heritage despite external influences and changes over time.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

The second type of populism is referred to as “libertarian populism” (also referred to as “market fundamentalist populism”). This type of populism focuses on wealth inequality within society and promises to change the social order to achieve a fairer redistribution of wealth.<sup>71</sup> In doing so, libertarian populism blames the current politicians, the public servants, and the elite, all of which are conceived as accountable for the economic inefficiencies and the limited economic competition (crush monopolistic players, or cartels) that would allow individuals, regardless of their status, to have a fair and equal opportunity to participate and lead.

[Market fundamentalist populism] looks to rein in global economic elites and redistribute wealth. Redistributive populism can manifest in various ways, from progressive attempts to regulate the market economy and to achieve a just economic system in which “[e]verybody does better when everybody does better” to protectionist measures against globalization.<sup>72</sup>

However, libertarian populism offers an unrealistic dream and or fantasy (if desired at all) according to which one earner is enough to sustain the household. However, in an era of globalization, such dreams may be unrealistic.<sup>73</sup>

The third type of populism is referred to as “exclusionary populism” (also referred to as “anti-pluralist populism”). This type of populism offers a simplistic, binary, and singular classification of the authentic people and implies that those who do not support the populist ideology are against the populists (you are a “fifth column,” who are automatically viewed as supporters of “the enemy”).<sup>74</sup> This type of populism leads to divisions within the people instead of involving all groups within society, and it undermines fragile societal cohesion.<sup>75</sup>

The fourth type of populism is referred to as “xenophobic populism.”<sup>76</sup> This type of populism attempts to limit or deny privileges to “people” who were outsiders and migrated to the society. In a way, this populism focuses on ethnicity or cultural homogeneity and sees diversity or dissolution of identity or culture as an immediate threat to society and its people. The politicians who adopt xenophobic populism resist economic migration and promise their advocates that such resistance to globalism will protect them and offer them “social security, equality, and democratic accountability,” even when such promises are unrealistic. The example of Brexit, where the

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<sup>71</sup>See Matt Bruenig, *The Ultimate Problem With Libertarian Populism*, PEOPLE’S POL’Y PROJECT (Dec. 14, 2017), <https://www.peoplespolicyproject.org/2017/12/14/the-ultimate-problem-with-libertarian-populism/> [<https://perma.cc/2B47-JW96>]; William Ramp & Trevor W. Harrison, *Libertarian Populism, Neoliberal Rationality, and the Mandatory Long-form Census: Implications for Sociology*, 37 CANADIAN J. SOC. 273, 278–79 (2012).

<sup>72</sup>See *supra* note 54.

<sup>73</sup>*Id.*

<sup>74</sup>See João V. S. Ozawa, Joseph Straubhaar, & Samuel Woolley, *When Right-Wing Populism Becomes Distorted Public Health Communication: Tracing the Roots of Jair Bolsonaro’s Epidemiological Denialism*, 17 INT’L J. COMM’N 1818, 1821 (2023).

<sup>75</sup>*Id.*

<sup>76</sup>Veda Elizabeth Beltran, *Xenophobia, Populism, and the Rise of the Far-Right in France and Germany* (Dec. 2016) (B.A. thesis, Claremont McKenna College), [http://scholarship.claremont.edu/cmc\\_theses/1478](http://scholarship.claremont.edu/cmc_theses/1478) [<https://perma.cc/4PHC-M942>]; see also European Commission Against Racism & Intolerance Press Release, *Unrelenting Rise in Xenophobic Populism, Resentment, Hate Speech in Europe in 2017* (June 22, 2018), <https://www.coe.int/en/web/portal/-/unrelenting-rise-in-xenophobic-populism-resentment-hate-speech-in-europe-in-2017> [<https://perma.cc/B2YH-8U8A>].

U.K. voted to leave the European Union, possibly illustrates the solidity such ideology may entail.

The fifth type of populism is referred to as “electoral populism.” This type of populism focuses on taking control of governmental institutions, ultimately through electoral politics, to reform economic policies.<sup>77</sup>

Participatory, or “thick,” populism is oriented toward ordinary citizens’ self-organizing practices, everyday spaces of public action, and the institutional reform of the economy with the government as a potential partner in this process. It often involves efforts to protect and reinvigorate local communities, typically rural ones, through “collective action on the part of relatively powerless organized community interests” for equitable economic development.<sup>78</sup>

The principal idea behind electoral populism is that a successful takeover of governmental institutions will provide the opportunity to replace public servants and instill their ideology for the current term, possibly even longer—for example, through the nomination of Supreme Court justices whose terms are significantly longer.

The sixth and last type of populism is referred to as “nostalgic populism.” This type of populism “embodies the legacy of romanticism: the implicit, clairvoyant sense of the traditional and thus the natural wisdom of the masses.”<sup>79</sup> These expressions represent the aspirations of people who wish to reverse their economic conditions to those they had before the changes brought by globalization. In an era of globalization, the uneducated people who are left behind are the leading supporters of nostalgic populism, even though the ability of the leaders to overcome the global pressures and opt-out of the global economy is unrealistic and it is not entirely clear that would serve society’s economic interests.<sup>80</sup> As explained earlier, Brexit may serve as a good example.

However, regardless of the distinctions between the different types of populism, history shows that politicians use different types of populism to gain the people’s support and, in doing so, take advantage of the public’s economic illiteracy in general and in taxation, in particular. Populism generally undermines the social order and aims to benefit interest groups at the expense of the general public. Even though there is hardly any consensus on the definition of populism, it seems that its principal characteristic is the invocation of “the people” who are betrayed, wronged, or otherwise left vulnerable to forces outside their control and that populist leaders gain more support as a reaction to a deep crisis, which can lead to democratic deconsolidation.

## II. POPULIST TRAITS IN TAX DISCUSSIONS

Part II focuses on the recurring populist characteristics evident in discussions and statements about the U.S. federal tax system. Many of the

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<sup>77</sup> Kenneth M. Roberts, Populism, *Political Conflict, and Grass-Roots Organization in Latin America*, 38 COMPAR. POL. 127, 132 (2006).

<sup>78</sup> *Id.* at xi.

<sup>79</sup> *Id.*

<sup>80</sup> See generally William A. Galston, *The Populist Challenge to Liberal Democracy*, 29 J. DEMOCRACY 5 (2018).

issues mentioned in this Part happen because most of the public misunderstand how the U.S. federal tax system works and technical tax terms.<sup>81</sup> It is imperative to emphasize that the examples provided here, just like any other examples within this Article, should not be perceived as either general or specific criticism of the mentioned politicians or political parties. The examples in this Part are solely illustrative of populist frameworks and language within the context of this Article alone.

#### A. APPEALING TO “THE PEOPLE”

In tax discussions, populists frequently present a narrative of contention between the people and the elites. The populists declare that the elites exploit the people, contending that taxes serve as a means for the so-called “elites” to extract wealth from the masses.<sup>82</sup> Populists often use simple language when discussing taxes and avoid using jargon or technical terms, aiming to elucidate complex matters in a manner accessible to the average person. Populists often use personal stories and anecdotes to illustrate their points about taxes. They may tell stories about people who have been hurt by the federal tax system or, for instance, they may tell stories about people who have benefited from tax cuts, if that is what they are promising the people.

Note that it does not matter which party the politician belongs to, whether the politicians are conservatives or liberals; the argument is always that the politician invoking populism is always representing the people while the opposing party or politician is representing the elites.<sup>83</sup>

#### B. DISTRUST OF THE GOVERNMENT

Populists often express distrust of the government, whether directly or indirectly. They regularly argue that the government is corrupt, does not work for the people, or is simply inefficient and, as such, cannot be trusted to manage tax revenue effectively.

Global financial markets are often characterized as being controlled by the elites, and the 2008 financial crisis only fueled those beliefs.<sup>84</sup> Some banks and international corporations benefited from the 2008 financial crisis while also enjoying government bailouts, which only exacerbated distrust<sup>85</sup>

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<sup>81</sup> For more on this problem, see Thomas & Scharff, *supra* note 2.

<sup>82</sup> See *The Political Crisis of the 1890s*, DIGITAL HISTORY, [https://www.digitalhistory.uh.edu/disp\\_textbook\\_print.cfm?smtid=2&psid=3127](https://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid=2&psid=3127) [https://perma.cc/A33Q-NVXZ] (last accessed Apr. 3, 2024).

<sup>83</sup> Canovan *supra* note 11, at 316–18 (1984). Canovan even states that historically, in U.S. politics, this strategy has been used successfully by the populists all the way back to 1890.

<sup>84</sup> For decades, economic theory has advanced the notion that the economic behavior of individuals, and consequently to that, efficient markets, was mostly guided by rational self-interest. This perspective, mistakenly interpreting Adam Smith's concept of the so-called “invisible hand,” argued that the collective pursuit of individual selfishness would somehow generate the public good. Trustworthiness, it was argued, played a negligible role. It was believed that markets possessed self-correcting mechanisms due to the presence of reliable risk models capable of handling short-term irregularities. However, during the 2007–2008 crisis, major banks experienced a severe erosion of the most fundamental trust among one another. The crisis exposed a stark reality: risk had been significantly underestimated, and the mutual trust that had been assumed turned out to be far more fragile. It became evident that markets were not inherently self-correcting, and trustworthiness emerged as a crucial factor after all.

<sup>85</sup> Geoffrey Hosking, *The Decline of Trust in Government*, in TRUST IN CONTEMPORARY SOCIETY 77, 87 (Masamichi Sasaki ed., 2019) [https://acuresearchbank.acu.edu.au/download/fdae15e7dc7ae5b2f9f557a5eb2a27c9dbedf48e9f63e7e755f68d73dc6809bc/307757/OA\\_Barbalet\\_2019\\_The\\_experience\\_of\\_trust\\_Its\\_content.pdf](https://acuresearchbank.acu.edu.au/download/fdae15e7dc7ae5b2f9f557a5eb2a27c9dbedf48e9f63e7e755f68d73dc6809bc/307757/OA_Barbalet_2019_The_experience_of_trust_Its_content.pdf).

and strengthened the feeling that the government works to benefit major banks and corporations.

### C. SIMPLISTIC SOLUTIONS

Populists often offer simplistic solutions to complex tax problems. They may argue for tax cuts for everyone, a flat tax, or a consumption tax. For instance, Senator Bernie Sanders' presidential campaign and its supporters called for a "Wall Street sales tax" or a "speculation tax" on Wall Street<sup>86</sup> to fund free college education.<sup>87</sup> Nowhere to be found by those suggesting these taxes, however, was an analysis of such tax: how it would be structured or the risks such tax imposes on the financial markets. These solutions are often very popular with voters, but they may not be the best way to address the challenges facing the tax system, as those are not supported by economic and policy studies.

### D. EMOTIONAL APPEALS

Populists often use emotional appeals to win over voters. They may talk about the unfairness of the tax system or the need to protect the middle class. These appeals can be effective in mobilizing voters, but they may not be based on sound economic analysis. The emotional appeals are rarely based on any meaningful macro-economic policy, they mostly focus on two contradicting emotions: the individual's frustration with the system, and the hope that "someone" will fix the system so the individual will benefit from it.<sup>88</sup>

## III. EXAMPLES OF POPULIST TRAITS IN TAX DISCUSSIONS

Former President Donald Trump is perhaps the most well-known American politician who often uses populist rhetoric. Trump consistently framed tax discussions as a clash between "the people" and "the elites."<sup>89</sup> His argument revolved around the notion that the elites exploited the general population, using taxes to siphon money away from them. Employing straightforward language and personal narratives, he aimed to elucidate his stance on taxes.

For instance, he frequently highlighted the perceived unfairness of the tax system against the middle class and shared stories of individuals adversely affected by it.<sup>90</sup> During his primary campaign in 2015, Trump extensively criticized Wall Street executives for their insufficient tax payments and, at least in one interview, he remarked, "[T]he hedge fund guys

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<sup>86</sup> Bob Master, *Is Class Warfare Back? The Sanders Phenomenon and Life After Neoliberal Capitalism*, 25 NEW LAB. F. 32, 38–39 (2016).

<sup>87</sup> *Id.* at 38.

<sup>88</sup> See generally Manuela Caiani & Jessica Di Cocco, *Populism and Emotions: A Comparative Study Using Machine Learning*, 53 ITALIAN POL. SCI. R. 351 (2023); Laura Alonso-Muñoz & Andreu Casero-Ripollés, *The Appeal to Emotions in the Discourse of Populist Political Actors from Spain, Italy, France and the United Kingdom on Twitter*, 8 FRONTIERS COMMUN. (2023), <https://www.frontiersin.org/journals/communication/articles/10.3389/fcomm.2023.1159847/full> [<https://perma.cc/YGX5-FWHW>].

<sup>89</sup> *Donald Trump's Inaugural Speech, Annotated*, N.Y. Times (Jan. 20, 2017), <https://www.nytimes.com/interactive/2017/01/20/us/politics/donald-trump-inauguration-speech-transcript.html> [<https://perma.cc/XU5B-E6LZ>].

<sup>90</sup> *Id.*

are getting away with murder.”<sup>91</sup> Also, while on the campaign trail, Trump said, “We are going to make sure that my friends in the hedge fund business who make a fortune and pay virtually no tax, they are going to start paying taxes, they’re gonna [sic] start paying taxes.”<sup>92</sup> In an interview with MSNBC, Trump said:

“[W]hat I want to do is I want to simplify the tax code . . . nobody knows the tax code better than I do. . . . I’m the king of the tax code. . . . we’re going to simplify the tax code, take away some of the deductions. And hedge fund guys have to pay up.”<sup>93</sup>

A year later, while in office, Trump said, “Our tax code, which now wastes billions and billions of dollars a year just in compliance, will become simple, streamlined, and efficient, and go way, way down—we’re taking those taxes way down. Way down. Your taxes are going way down.”<sup>94</sup> While Congress was working on the Tax Cuts and Job Act (“TCJA”),<sup>95</sup> Trump said the following in a speech on the issue of tax reform during an event in North Dakota:

[T]he policy we’re talking about is cutting your taxes. Do you like that policy? . . . . The taxes are crazy—the highest-taxed nation in the world. We’re going to turn that around very quickly. . . . [Y]ou are all in favor of tax cuts, aren’t you? . . . . [W]e’re going to restore America’s competitive edge by passing tax cuts and reform that makes America the best place in the world to hire, invest, and to grow. . . . North Dakota chose to embrace American industry and the American worker even when many in Washington wanted to tax and regulate your industries totally out of existence. . . . But our country and our economy cannot take off like they should unless we reform America’s outdated, complex, and extremely burdensome—I mean, this is so complicated and so burdensome—our tax code. . . . Our tax code is a giant self-inflicted economic wound. . . . [W]e need tax reform that is pro-growth, pro-jobs, pro-worker, pro-family, and, yes, pro-American. And anybody that is going to vote against tax cuts and tax reforms—whether it’s in North Dakota or anybody else, or anyplace else—you got to vote against them and get them out of office because it is so bad.<sup>96</sup>

But Trump is certainly not the only one to fault for this; take Senator Bernie Sanders for instance. Sanders identifies as a self-proclaimed

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<sup>91</sup> James Oliphant, *Trump’s Economic Advisory Group Clashes with Populist Image*, REUTERS (Aug. 5, 2016, 4:51 PM), <https://www.reuters.com/article/usa-election-trump-economy-idUKL8N1AM5ZI> [<https://perma.cc/ZG3P-DTGM>].

<sup>92</sup> Presidential Candidate Donald Trump: Campaign Speech in Boone, Iowa (Sept. 12, 2015), <https://factba.se/transcript/donald-trump-speech-boone-ia-september-12-2015> [<https://perma.cc/Y6WW-6H22>].

<sup>93</sup> Interview by Joe Scarborough and Mika Brzezinski with Donald Trump, Presidential Candidate (Aug. 28, 2015).

<sup>94</sup> Presidential Candidate Donald Trump, Campaign Speech in Toledo, Ohio (Sept. 21, 2016), <https://factba.se/transcript/donald-trump-speech-toledo-oh-september-21-2016> [<https://perma.cc/GU3M-8CPT>].

<sup>95</sup> *Tax Cuts and Jobs Act: A comparison for business*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-businesses> [<https://perma.cc/BN2B-WGP9>] (last updated Dec. 19, 2023).

<sup>96</sup> President Donald Trump, Speech on Tax Reform in North Dakota (Sept. 6, 2017).

democratic socialist and has long voiced criticism of the tax system.<sup>97</sup> He contends that the current system is unjust, disproportionately benefiting the wealthy while disadvantaging the poor and middle class.<sup>98</sup> In his pursuit of tax system reforms, Sanders has put forth several policy proposals, including the implementation of progressive taxes on both income and wealth.<sup>99</sup> Sanders was able to get significant traction during his campaigns with messages that appealed to “the people” and a populist rhetoric that focused on “the elite” (i.e., the wealthy).

For instance, Sanders’ presidential slogan was, “Three words: tax the wealthy.”<sup>100</sup> In an interview on HBO, he called for income over \$1 billion to be taxed at 100 percent and said, “I think people can make it on \$999 million. I think that they can survive just fine.”<sup>101</sup> But even Sanders’s campaign website uses populist rhetoric when it comes to taxation. The headline, “Tax on Extreme Wealth,” is immediately followed by a short statement that uses almost all the populist rhetoric tools mentioned before: “In order to reduce the outrageous level of inequality that exists in America today and to rebuild the disappearing middle class, we must establish an annual tax on the extreme wealth of the top 0.1%.”<sup>102</sup>

Nevertheless, Trump and Sanders are far from being the sole U.S. political figures who employ such rhetoric. The landscape of American politics in recent decades is replete with numerous other politicians who have embraced comparable strategies. Under the leadership of former President Reagan, for example, Congress passed the most significant tax reform in American history. Reagan said, “The more government takes in taxes, the less incentive people have to work. What coal miner or assembly-line worker jumps at the offer of overtime when he knows Uncle Sam is going to take sixty percent or more of his extra pay?”<sup>103</sup>

Ross Perot—a billionaire businessman who entered the presidential race as an independent candidate in both the 1992 and 1996 elections—was sometimes even referred to by the media as the “billionaire populist.”<sup>104</sup> Perot expressed strong criticism of the tax system, asserting that it lacked fairness and efficiency.<sup>105</sup> Perot put forward several proposed alterations to the tax system, including the implementation of a flat tax and a consumption tax, but also suggested taking away Congress’s right to raise taxes and that

<sup>97</sup> Isaac Chotiner, *How Socialist Is Bernie Sanders?*, NEW YORKER (Mar. 2, 2020), <https://www.newyorker.com/news/q-and-a/how-socialist-is-bernie-sanders> [https://perma.cc/PJK9-VHH8].

<sup>98</sup> *Taxes on Extreme Wealth*, BERNIE SANDERS, <https://berniesanders.com/issues/tax-extreme-wealth/> [https://perma.cc/LWT6-8AK9].

<sup>99</sup> *Id.*  
<sup>100</sup> Bernie Sanders @SenSanders, TWITTER (Oct. 27, 2021, 10:20 AM), <https://twitter.com/SenSanders/status/1453411262461845517> [https://perma.cc/8K6B-GQ2Y].

<sup>101</sup> See *Bernie Sanders Calls for Income Over \$1 Billion to be Taxed at 100%*, UNUSUAL WHALES: THE BLUBBER (May 2, 2023), <https://unusualwhales.com/news/bernie-sanders-calls-for-income-over-1-billion-to-be-taxed-at-100/> [https://perma.cc/G3NR-N959].

<sup>102</sup> *Tax on Extreme Wealth*, BERNIE, <https://berniesanders.com/issues/tax-extreme-wealth/> [https://perma.cc/6E9A-DVR3] (last visited Oct. 20, 2023).

<sup>103</sup> *Ronald Reagan on Tax Reform*, ON THE ISSUES, [https://www.ontheissues.org/Celeb/Ronald\\_Reagan\\_Tax\\_Reform.htm](https://www.ontheissues.org/Celeb/Ronald_Reagan_Tax_Reform.htm) [https://perma.cc/5LAQ-BCB7] (last visited Oct. 20, 2023) (citing DONALD TRUMP, *TIME TO GET TOUGH: MAKING AMERICA #1 AGAIN* (2011)).

<sup>104</sup> *Ross Perot on Tax Reform*, ON THE ISSUES, [https://www.ontheissues.org/celeb/Ross\\_Perot\\_Tax\\_Reform.htm](https://www.ontheissues.org/celeb/Ross_Perot_Tax_Reform.htm) [https://perma.cc/5VB7-B82D] (last visited Oct. 20, 2023).

<sup>105</sup> See James Brooke, *Perot Urges Redesign of Tax System*, N.Y. TIMES (Sept. 9, 1996), <https://www.nytimes.com/1996/09/09/us/perot-urges-redesign-of-tax-system.html> [https://perma.cc/N9E6-P4JF].



“if they want to raise taxes, put it on the ballot.”<sup>106</sup> Perot suggested, “We should raise the marginal tax rate on the wealthy . . . . Therefore, less than 4% of the taxpayers in America will be affected.”<sup>107</sup>

The examples cited in this Part merely scratch the surface, as our political leaders consistently resort to populist rhetoric when addressing the U.S. federal tax system. Nevertheless, if populism was limited to speeches and interviews, its impact might not be as problematic as it is. Unfortunately, as the next Part will show, that is not the case. Populism in tax discussions eventually finds its way into the federal tax law.<sup>108</sup>

#### IV. POPULIST TRAITS IN THE U.S. FEDERAL TAX SYSTEM

To begin this discussion, we must first answer: Why do governments use tax? Professor Reuven S. Avi-Yonah, in his pivotal work “The Three Goals of Taxation,”<sup>109</sup> argues that there are three main goals for taxation: generating revenue,<sup>110</sup> redistributions of wealth,<sup>111</sup> and regulation.<sup>112</sup>

The first goal of taxation—generating revenue—is accepted by most. Governments provide their people with certain services, so there is a need for every government to raise sufficient revenue to be able to provide those services to its people. However, does the U.S. government implement this goal in its federal tax policy?

The U.S. federal government has spent \$1.16 trillion more than it has collected in the fiscal year 2023, resulting in a national deficit.<sup>113</sup> However, such a deficit is not predestined but rather a political, conscious choice. Based on the Joint Committee on Taxation’s report on the tax expenditures in the U.S. tax code, the total tax expenditure in 2022 amounted to \$1.721 trillion (\$162 billion to corporations and approximately \$1.559 trillion to individuals).<sup>114</sup>

Among the \$1.559 trillion individual expenditures, the biggest benefit of these expenditures is reducing rates of tax on dividends and long-term capital gains (approximately \$239 billion a year) which are mainly available for high earners and as such are regressive.<sup>115</sup> Another example of such regressivity is the Mortgage Interest Deduction (“MID”), which is also one

<sup>106</sup> IRS *supra* note 95.

<sup>107</sup> *Id.*

<sup>108</sup> See also Reuven S. Avi-Yonah & Tamir Shanan, *Rethinking Taxing Excess Profits*, 77 TAX LAWYER 269 (2024) (discussing the recent populist shift to raise excess profit tax in addition to other taxes).

<sup>109</sup> Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3–4 (2006).

<sup>110</sup> *Id.* at 5 (“Taxes are what we pay for a civilized society . . . .”) (quoting *Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting)).

<sup>111</sup> *Id.* at 10 (“The case for drastic progression in taxation must be rested on the case against inequality.”) (quoting HENRY C. SIMONS, PERSONAL INCOME TAXATION 18 (1938)).

<sup>112</sup> *Id.* at 22 (“[T]he power to tax involves the power to destroy.”) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819)).

<sup>113</sup> *A Warning About the Nation’s Fiscal Health*, U.S. Government Accountability Office (Feb. 16, 2024), <https://www.gao.gov/blog/warning-about-nations-fiscal-health#:~:text=For%20example%2C%20the%20federal%20budget,growing%20source%20of%20government%20spending> [https://perma.cc/L564-8GYC].

<sup>114</sup> Alex Muresianu, *JCT Tax Expenditure Report: Not All Expenditures Are Created Equal*, TAX FOUND. (Feb. 13, 2023), <https://taxfoundation.org/largest-tax-expenditures-saving-investment-tax/> [https://perma.cc/BY49-9LBQ].

<sup>115</sup> *Id.*

of the largest federal tax expenditures.<sup>116</sup> The MID allows taxpayers to deduct expenses for those who use the itemized tax deduction.<sup>117</sup> This benefit principally allows homeowners to deduct the interest they pay on their mortgage from their taxable income, which of course reduces it.<sup>118</sup> The deduction was created to encourage homeownership but has since turned into a major tax break for the wealthy.

In 2017, the top one percent of earners claimed an average of \$26,000 in mortgage interest deductions, while the bottom twenty percent of earners claimed an average of \$300. The Tax Cuts and Jobs Act of 2017 (“TCJA”), which was passed with only the Republican Party’s support, reduced the amount of loans (i.e., the principal) and limited the types of loans that qualify for the deduction.<sup>119</sup> It is argued that the MID benefits mostly high-income taxpayers because those taxpayers often itemized more than other taxpayers.<sup>120</sup>

The MID is a populist tax policy because it benefits homeowners, who are a large and politically powerful group. However, it also hurts the efforts to raise tax revenue because it allows wealthy homeowners to deduct a large amount of their income from their taxes. Note that wealthy taxpayers are also more likely to pay less (by percentages) in federal taxes because of their access to high-level tax consulting.<sup>121</sup> In 2017 (pre-TCJA), the MID cost the federal government \$66.4 billion,<sup>122</sup> and it can easily be argued that this money could have been used for much more important purposes, such as education, healthcare, or infrastructure.

Another example of a populist tax rule that leads to a loss of tax revenue that perhaps should be reconsidered and reevaluated is the American Opportunity Tax Credit (“AOTC”)<sup>123</sup> which was introduced in the American Recovery and Reinvestment Act of 2009 and provides taxpayers with partially refundable tax credit for “qualified education expenses” paid by an “eligible student” for his or her first four years of higher education.<sup>124</sup> The

<sup>116</sup> Will Fischer & Chye-Ching Huang, *Mortgage Interest Deduction is Ripe for Reform*, CTR. ON BUDGET & POL’Y PRIORITIES (June 25, 2013), <https://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform> [<https://perma.cc/7MPJ-EF77>].

<sup>117</sup> *Id.*

<sup>118</sup> I.R.C. § 163(h); see also IRS, PUBLICATION 936: HOME MORTGAGE INTEREST DEDUCTION 2 (2022).

<sup>119</sup> The current principal amount of \$750,000 limitation was introduced in 2017 in the TCJA and will snap-back to the old principal amount limitation of \$1 million after 2025. *Mortgage Interest Deduction*, TAX FOUND.: TAXEDU, <https://taxfoundation.org/tax-basics/mortgage-interest-deduction-mid/> [<https://perma.cc/4LCU-44GG>] (last visited Oct. 20, 2023).

<sup>120</sup> *Id.*

<sup>121</sup> Robert McClelland & Livia Mucciolo, *How the TCJA Affected the Housing Market*, TAX POL’Y CTR.: TAXVOX (Mar. 30, 2022), <https://www.taxpolicycenter.org/taxvox/how-tcja-affected-housing-market> [<https://perma.cc/H6VA-AWHZ>]; see also ROBERT MCCLELLAND, LIVIA MUCCILO & SAFIA SAYED, NEW EVIDENCE ON THE EFFECT OF THE TCJA ON THE HOUSING MARKET 6 (2022).

<sup>122</sup> MARK P. KEIGHTLEY, CONG. RSCH. SERV., R46429, AN ECONOMIC ANALYSIS OF THE MORTGAGE INTEREST DEDUCTION 1 (2020). As a result of the TCJA it is estimated by the Joint Committee on Taxation that the Mortgage Interest Deduction cost \$30.2 billion in 2020. However, note that the limitation on the Mortgage Interest Deduction will snap-back to the pre-TCJA limitation at the end of 2025.

<sup>123</sup> I.R.C. § 25A(b); see also *American Opportunity Tax Credit*, IRS (Oct 6, 2023), <https://www.irs.gov/credits-deductions/individuals/aotc> [<https://perma.cc/X9R4-5MZ7>].

<sup>124</sup> The amount of the credit is 100% for the first \$2,000 of “qualified education expenses” paid for that “eligible student,” and 25% for the next \$2,000 of “qualified education expenses” paid for that “eligible student.” See IRS, *supra* note 123. These credits are phased out for taxpayers with an adjusted gross income between \$160,000 and \$180,000 if married filing jointly (\$80,000 and \$90,000 for other taxpayers). OFF. OF TAX ANALYSIS, U.S. DEP’T OF TREAS., TAX EXPENDITURES FOR THE FISCAL YEAR 2023 (Mar. 6, 2023) <https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2024-update.pdf> [<https://perma.cc/4MNV-5KVU>].

estimated cost of the AOTC in 2022 was almost \$14.58 billion.<sup>125</sup> Since higher education costs keep rising, the benefit to taxpayers from this tax rule continues to diminish and becomes almost de-minimis. Like the Mortgage Interest Deduction, it can easily be argued that this tax revenue, if collected, could have been used for more important purposes—such as education, healthcare, or infrastructure—and had a much bigger impact on American society.

The second goal of taxation, redistribution of wealth is perhaps the most challenging goal of the three goals mentioned earlier. Generally, tax policy is often focused on inequality and the ways to limit it as much as possible, which is why taxes are not applied per person equally (e.g., head taxes), thus minimizing tax distortion caused by certain tax incentives.<sup>126</sup>

The seminal work of Arthur Pigou,<sup>127</sup> which was followed by Mirrlees,<sup>128</sup> attempted to structure an optimal tax system and integrate welfare considerations through a “social welfare function.”<sup>129</sup> This function tallies total societal well-being, accounting for the benefits of efficiency, preference satisfaction, and potentially other values and inputs that reflect individual well-being.<sup>130</sup> However, it is difficult to ignore a very basic and straightforward question: if inequality is so important in taxation research and tax policy, but inequality has been rising consistently in the U.S. since the 1980s,<sup>131</sup> is the redistribution of wealth through the U.S. federal tax system effective and achieving its purpose? Or should we step back and ask whether it is a sound policy to tackle the wealth inequality through the U.S. federal income tax system?

Nevertheless, progressive income taxation has been a central and consistent feature of the federal tax system since the ratification of the Sixteenth Amendment in 1913 and even proceeds its enactment.<sup>132</sup> It has been a central element in the scholarly writing of leading economists, who advocated for the enactment of a federal income tax system.<sup>133</sup>

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. The top rate reached 91% in the 1950s, the declined to 70% in the 1960s and never fell below that for the entire decade of the 1970s. Consistent with the story of the rise of the law and

<sup>125</sup> OFF. OF TAX ANALYSIS, *supra* note 124, at pg. 23 tbl.1 (line 98).

<sup>126</sup> Daniel Shavero, Tax Law, Inequality, and Redistribution: Recent and Possible Future Developments 2 (N.Y.U. L. & Econ. Rsch. Paper Ser., Working Paper No. 22-06, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3962466](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3962466) [<https://perma.cc/K8ZT-BF4Y>].

<sup>127</sup> ARTHUR C. PIGOU, A STUDY IN PUBLIC FINANCE 46 (3d ed. 1947).

<sup>128</sup> J. A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175, 175–76 (1971).

<sup>129</sup> *Social Welfare Function*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100515526> [<https://perma.cc/8ZRZ-7GLA>] (last visited Apr. 3, 2024).

<sup>130</sup> As Louis Kaplow and Steven Shavell explain, “[t]o 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).

<sup>131</sup> Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Microeconomic Accounts*, 34 J. ECON. PERSP. 3, 13 (2020); see also Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 495, 497–99, 506–09 (2022).

<sup>132</sup> Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of ‘Incomes,’* 33 ARIZONA STATE L.J. 1057, 1058, 1153 (2006).

<sup>133</sup> See, e.g., EDWIN R.A. SELIGMAN, PROGRESSIVE TAXATION IN THEORY AND PRACTICE 1 (1894).

economics movement, however, Congress and the Reagan administration sharply reduced top marginal tax rates in the 1980s, mainly in the name of efficiency. The rate dropped as low as 28% and has never risen above 39.6% since.<sup>134</sup>

However, during the Reagan administration, the marginal tax rates dropped and long-term capital gains and dividend distributions were set at fixed reduced rates, which is regressive, and annually costing billions of U.S. dollars afforded to high earners. Similarly, during the past two decades, the U.S. corporate income tax system adopted the Nordic concept, which currently taxes corporations at reduced rates. More recently, the Trump Administration reduced the overall tax (both at the corporate level and at the shareholder level) which increased regressivity significantly.

[These trends] undermine(s) the progressivity of the tax system because the burden of payroll taxes is largely regressive: lower income people now pay a much high 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. 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.<sup>135</sup>

These changes have led economists Emmanuel Saez and Gabriel Zucman to argue that the cuts of the tax brackets imposed on individuals (as well as the reduced rates for long term capital gains and dividend distribution), the reduction of the corporate tax rate, and, not less important, the changes made on estate taxes have brought the overall federal income tax system closer to a “flat tax.” Saez and Zucman argue that, because of these changes, the lowest income taxpayers are paying a similar effective rate to those at the top and such an outcome undermines the progressivity concept from a central element to a theory and scholarship, which undermines the second role of taxes in redistribution of wealth in recent decades.

From a theoretical point of view, 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. Economist Heather Boushey details how economic inequality may result in suboptimal investments in human capital, skill development, innovation, and public spending in general. 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.<sup>136</sup>

Under the existing tax rules, capital appreciation is not taxed currently, and the taxable event is deferred to realization. Such deferral is considered regressive as it mainly benefits well-off taxpayers. That is why the estate and gift tax has been and remains a significant source of progressivity, especially

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<sup>134</sup> Bearer-Friend et. al, *supra* note 5, at p. 63; see also *History of Federal Income Tax Rates: 1913-2024*, BRADFORD TAX INST., [https://bradfordtaxinstitute.com/Free\\_Resources/Federal-Income-Tax-Rates.aspx](https://bradfordtaxinstitute.com/Free_Resources/Federal-Income-Tax-Rates.aspx) [https://perma.cc/8BMQ-G5NN].

<sup>135</sup> Bearer-Friend, et al., *supra* note 5, at 523.

<sup>136</sup> *Id.* at 515.

as it only affects a handful of the wealthiest households (approximately two percent of households). Even though it does not raise a significant contribution to the governmental budget, it has been subject to harsh criticism and numerous attempts to repeal it as of the mid-1990s by the Republican Party. Such attempts were largely unsuccessful, though the legislation led to a permanent tax reduction and temporary repeal. The attempts to repeal the estate and gift tax can serve as a good example of populism, as presented below.

Despite the economic consensus of the contribution the estate tax has in generating a fairer, more progressive tax system, former President George W. Bush used the following populist speech against such “death taxes” through the following fake example from his electoral campaign:

Some months ago, in my speech to the Joint Session of Congress, I had the honor of introducing Steven Ramos to the nation. Steven is the network administrator for a school district. His wife, Josefina, teaches at a charter school. They have a little girl named Lianna. And they're trying to save for Lianna's college education . . . . [the repeal of the estate tax] makes the code more fair for small businesses and farmers and individuals by eliminating the death tax. (Applause.) Over the long haul, tax relief will encourage work and innovation. It will allow American workers to save more on their pension plan or individual retirement accounts. Tax relief expands individual freedom. The money we return, or don't take in the first place, can be saved for a child's education, spent on family needs, invested in a home or in a business or a mutual fund or used to reduce personal debt.<sup>137</sup>

This speech is fake because in any event, less than two percent of families in the United States are subject to estate taxes.<sup>138</sup> As such, it seems highly unlikely that the Ramos family would be subject to estate tax, and that the repeal of the estate tax would lead to any economic relief for them. Similarly, in a different speech, Bush explained that the elimination of the estate tax (death tax) would mean that people would not get taxed twice for their assets:

The death tax is a tax that causes the small business owner to pay taxes twice—once as you build your business, and then when you pass it on to your heirs. And it seems like to me that part of the American experience ought to make it easy for a mom or a dad, once he or she builds up his or her business, to pass it on to a son or a daughter. That's what America is all about, is the ability to transfer—(applause.)<sup>139</sup>

This justification is clearly imprecise, since the estate tax mainly taxes unrealized appreciated capital, and the elimination of such taxes is

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<sup>137</sup> George W. Bush, U.S. Pres., Remarks in Tax Cut Bill Signing Ceremony (Jun. 7, 2001) (transcript available at Office of the Press Secretary).

<sup>138</sup> See *Tax Policy Center Briefing Book*, URBAN-BROOKINGS TAX POLICY CTR., (available at [https://www.taxpolicycenter.org/sites/default/files/briefing-book/background\\_1.pdf](https://www.taxpolicycenter.org/sites/default/files/briefing-book/background_1.pdf) [<https://perma.cc/LYA5-CVL6>]).

<sup>139</sup> George W. Bush, U.S. Pres., Remarks to the United States Hispanic Chamber of Commerce, (Mar. 19, 2001), (transcript available at The American Presidency Project).

regressive, in fact leading to nontaxation. Moreover, the justification for such an amendment was “to boost the economy, and help create new businesses, new jobs and new growth, at a time when we need all three,”<sup>140</sup> even though it is unclear how such a change would benefit society as a whole and not merely the 0.2% who are subject to these taxes.<sup>141</sup>

What was no less striking was the multiyear recruitment of a handful of the wealthiest families to reshape American public opinion against the estate and gift tax, which resulted in assisting these families in reducing their overall effective tax liability significantly, as such taxes have not impacted approximately ninety-eight percent of U.S. households.

Over a decade ago, Michael Graetz and Ian Shapiro documented a multiyear effort by a subset of the country’s wealthiest families to reshape Americans’ understanding of the estate tax. Such efforts framed the estate tax as an unfair “double tax” that would burden small businesses and family farms, although, in reality, neither group faced a significant estate tax burden. This messaging campaign eroded popular support for the estate tax, leading to bipartisan legislation to permanently reduce and temporarily repeal it.<sup>142</sup>

The campaign—orchestrated by some of the wealthiest American families and Republican presidential candidates—was followed by futile attempts to repeal the estate and gift taxes.<sup>143</sup> However, bipartisan legislation—supported by both congressional Republicans, and by moderate congressional Democrats—led to a permanent reduction and temporarily repeal of the estate and gift taxes.<sup>144</sup> This was despite such repeal being viewed as unjustifiable by jurists and economists.<sup>145</sup> Even though the arguments in favor of repealing the estate tax were populist, the advocates for repeal succeeded by using fake facts and irrelevant examples that misled the voters and legislators.<sup>146</sup>

The third goal of taxation, regulation—and through such regulation to internalize social cost and social benefit—was one of the original goals for

<sup>140</sup> See also David A. Crockett, *George W. Bush and the Unrhetorical Rhetorical Presidency*, 6 RHETORIC & PUB. AFFS., 465, 481 (2003).

<sup>141</sup> Chye-Ching Huang & Chloe Cho, *Ten Facts You Should Know About the Federal Estate Tax*, CTR. BUDGET & POL. PRIORITIES (Oct. 30, 2017) <https://www.cbpp.org/research/ten-facts-you-should-know-about-the-federal-estate-tax> [https://perma.cc/T7FL-35TC]; see also *The Estate Tax is Irrelevant to More Than 99 Percent of Americans*, INST. TAX’N & ECON. POL. (Dec. 3, 2023) <https://itep.org/federal-estate-tax-historic-lows-2023/> [https://perma.cc/T7FL-35TC].

<sup>142</sup> Kathleen DeLaney Thomas & Erin Scharff, *supra* note 2, at 806; see MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 3 (2005); see also Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 58–64 (1990).

<sup>143</sup> See David Cay Johnston, *Dozens of the Wealthy Join to Fight Estate Tax Repeal*, N.Y. TIMES (Feb. 13, 2001), <https://www.nytimes.com/2001/02/13/politics/dozens-of-the-wealthy-join-to-fight-estate-tax-repeal.html> [https://perma.cc/7VJX-8A9D].

<sup>144</sup> See Emily Horton, *The Legacy of the 2001 and 2003 “Bush” Tax Cuts*, CTR. BUDGET & POL’Y PRIORITIES (Oct. 23, 2017), <https://www.cbpp.org/research/the-legacy-of-the-2001-and-2003-bush-tax-cuts> [https://perma.cc/ET9R-Q4YY].

<sup>145</sup> Grayson M.P. McCouch, *The Empty Promise of Estate Tax Repeal*, 28 VA. TAX REV. 369 (2008); David Cay Johnston, *Questions Raised On New Bush Plan To End Estate Tax*, N.Y. TIMES (Feb. 13, 2001), <https://www.nytimes.com/2001/01/29/business/questions-raised-on-new-bush-plan-to-end-estate-tax.html> [https://perma.cc/6KDK-9BJ3]; E.J. Dionne, Jr., *Bush’s \$1.6 Trillion Plan Isn’t a Tax Cut—It’s a Budget Buster*, Brookings Commentary (Feb. 20, 2001) <https://www.brookings.edu/articles/bushs-1-6-trillion-plan-isnt-a-tax-cut-its-a-budget-buster/> [https://perma.cc/JM99-XY6H].

<sup>146</sup> McCouch, *supra* note 145; Amy Goldstein, *Terminate Estate Tax, Bush Urges Senators*, WASH. POST (June 8, 2002), <https://www.washingtonpost.com/archive/politics/2002/06/08/terminate-estate-tax-bush-urges-senators/54ae415b-d0a9-475d-9414-0666c25aa451/> [https://perma.cc/3S3H-2RJE].

certain elements in our tax system, specifically the federal corporate income tax regime.<sup>147</sup> Conversely, even in the context of the federal corporate tax regime, it is hard to argue that corporations and, more specifically, multinational corporations are subject to effective regulatory frameworks. This regulation is especially ineffective when some of the multinational corporations' annual turnover is as large as most of the worldwide countries, if not larger and more powerful than most of them. The significant power and wealth these multinational corporations accumulated over the years has led them to successfully reduce their global corporate income tax rate.<sup>148</sup> Many of these corporations are subject to little taxation—significantly lower than the statutory corporate income tax rates imposed in the countries in which they operate and sell/render their goods and services.<sup>149</sup>

Similarly, even when it comes to tax rules that apply to individuals, an attempt to increase wealth redistribution among low earners regulates people's behavior and boosts the labor market. The Earned Income Tax Credit (the "EITC") is such an example. It was initially a targeted attempt to assist low earners that would not be too costly, would reduce welfare payments, and would increase tax revenues and social contribution.<sup>150</sup> However, as shown below, the EITC is also one of the largest federal tax expenditures, costing approximately \$70 billion annually, and its contribution to the labor force is not entirely clear.<sup>151</sup>

The EITC is a federal tax credit for low- and moderate-income working people that was introduced in 1975 and is the largest federal program that assists those U.S. households.<sup>152</sup> In theory, the EITC increases the earnings of individuals with low wages, concurrently mitigating the impact of federal payroll and income taxes.

The EITC garnered support from both conservative and liberal factions. Conservatives saw the EITC as a non-welfare program tied to labor and considered it an earned benefit that stimulates the economy by fostering greater labor force participation.<sup>153</sup> Meanwhile, liberals viewed the program as a politically viable means of directing financial aid to low-income

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<sup>147</sup> Pursuant to legislative history the corporate income tax of 1909 was originally seen as a way to regulate and control corporations. See Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1217–20 (2004); Doron Narotzki & Tamir Shanan, *Corporate Income Tax: We Tried the Stick, How About the Carrot?*, MICH. BUS. & ENTREPRENEURIAL L. REV. (forthcoming 2024) (available at <https://ssrn.com/abstract=4240939>) [<https://perma.cc/6D5L-WCPB>].

<sup>148</sup> See Juan Carlos Suárez Serrato & Owen M. Zidar, *How Do Corporate Taxes Affect Economic Activity?*, (Oct. 10, 2023), <https://www.nber.org/reporter/2023number3/how-do-corporate-taxes-affect-economic-activity> [<https://perma.cc/H45K-URGL>].

<sup>149</sup> James R. Hines Jr., *Business Tax Burdens and Tax Reform*, BROOKINGS PAPERS ON ECON. ACTIVITY 449, 464 (2017), [https://www.brookings.edu/wp-content/uploads/2017/09/5d\\_hines.pdf](https://www.brookings.edu/wp-content/uploads/2017/09/5d_hines.pdf) [<https://perma.cc/4AYU-ZRU5>].

<sup>150</sup> *Earned Income Tax Credit (EITC)*, I.R.S., <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit-eitc> [<https://perma.cc/7HT5-WVZF>].

<sup>151</sup> See *What Is The Earned Income Tax Credit?*, PETER G. PETERSON FOUNDATION (Feb 21, 2024), <https://www.pgpf.org/budget-basics/what-is-the-earned-income-tax-credit#:~:text=Tax%20Credits%20and%20the%20Budget,cost%20of%20other%20major%20programs> [<https://perma.cc/6JHZ-CZ74>].

<sup>152</sup> Chris Edwards, *Earned Income Tax Credit: Small Benefits, Large Costs*, 73 CATO INST. TAX & BUDGET BULL. 1, 1 (Oct. 2015), <https://www.cato.org/tax-budget-bulletin/earned-income-tax-credit-small-benefits-large-costs> [<https://perma.cc/3NNY-DMM2>].

<sup>153</sup> See Lawrence M. Mead, *Overselling the Earned Income Tax Credit*, NAT'L AFFS. (2014), <https://www.nationalaffairs.com/publications/detail/overselling-the-earned-income-tax-credit> [<https://perma.cc/JW6Y-9SHA>].

individuals, bolstered by the fact that recipients tend to earn additional wages because of the credit, thereby encouraging increased work activity.<sup>154</sup>

However, research by economist Henrik Kleven found that “the EITC has not had any clear effects on extensive margin labor supply,”<sup>155</sup> and although the 1993 increase in the value of the EITC led to a substantial rise in employment, unlike other increments, he suggested that the 1993 increase may be attributed to concurrent state and federal welfare reforms, as well as the economic boom of the 1990s, rather than to the EITC itself.<sup>156</sup> Kleven further discussed the alternatives due to the lack of support for the alleged benefits of the EITC. For the liberals’ approach, perhaps the government should adopt, instead of the EITC, a cash subsidy for low-income households, such as a negative income tax or a basic income.<sup>157</sup> For the conservatives, Kleven’s research suggested that comprehensive welfare reform is more economically effective in pushing people into work.<sup>158</sup>

Kleven is not the first to review the EITC and question its benefits. Research published in 2020 by Matt Bruenig from the People’s Policy Project, a left-leaning think-tank,<sup>159</sup> found that the EITC does not substantially reduce poverty or increase employment in an administratively efficient way and found that the EITC was greatly overstated in terms of both efficiency and effectiveness.<sup>160</sup> If the largest federal tax credit program to assist low to moderate-income taxpayers is not clearly and undoubtedly successful in achieving its purpose, one should ask themselves if this is a sound policy.

Nonetheless, there are no serious discussions in Congress or among other policymakers regarding canceling the EITC, mostly because it will not go well with “the people.” To put it simply, taking away a large federal tax credit program will make legislators look bad since taking away tax credits is not a popular move. If the discussions regarding taxation are populist and offer “magic” solutions, then it should not be surprising that the federal tax system adopts populism as well, which results in inefficiency and bad policy.

As this Part shows, there are major unresolved issues and open questions about the second and third goals of taxation. This leads to the argument that to minimize economic distortions and populism in our federal tax system, Americans should make sure that the federal tax system is focused on the first and second goals, and minimize other ends that add complexity, lack

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<sup>154</sup> See *id.*

<sup>155</sup> Henrik Kleven, *The EITC and the Extensive Margin: A Reappraisal*, 36 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26405, 2023), [https://www.henrikkleven.com/uploads/3/7/3/1/37310663/kleven\\_eitc\\_march2023.pdf](https://www.henrikkleven.com/uploads/3/7/3/1/37310663/kleven_eitc_march2023.pdf) [<https://perma.cc/PF8H-GJAJ>].

<sup>156</sup> *Id.*

<sup>157</sup> See George W. Bush *supra* note 139.

<sup>158</sup> *Id.* at 37–38. For a summary and a simplified explanation of Kleven’s findings, see Dylan Mathews, *A Major New Study Finds the Biggest Federal Work Subsidy Doesn’t Promote Work*, VOX (Oct. 3, 2018), <https://www.vox.com/future-perfect/2019/10/3/20895338> [<https://perma.cc/BLS6-W49K>].

<sup>159</sup> About, PEOPLE’S POLICY PROJECT, <https://www.peoplespolicyproject.org/about/> [<https://perma.cc/MB7W-LK8Q>].

<sup>160</sup> Matt Bruenig, *Myths of the Earned Income Tax Credit*, PEOPLE’S POLICY PROJECT, <https://www.peoplespolicyproject.org/wp-content/uploads/2020/05/MythsoftheEITC.pdf> [<https://perma.cc/R58R-Y4KR>] (last visited Sept. 19, 2023). But see *Should Progressives Abandon the Earned Income Tax?*, CTR. FOR ECON. & POL. RSCH. (May 16, 2022) <https://cepr.net/should-progressives-abandon-the-earned-income-tax-credit/> [<https://perma.cc/GC53-PSN2>] (criticizing Bruenig’s findings); *In Defense of the Earned Income Tax Credit*, CTR. FOR ECON. & POL. RSCH. (May 26, 2020), <https://cepr.net/in-defense-of-the-earned-income-tax-credit/> [<https://perma.cc/5GCY-JCG7>].



neutrality, and inefficiencies that makes our system incomprehensive and more regressive.

Avi-Yonah was not wrong when he argued that taxation has three goals because, in theory, the tax system was used to promote these novel goals. In reality—and especially since there are now so many instances where it is evident that our federal tax system is consistently failing to achieve these goals—it is time to reconsider this approach and perhaps “clean up” the tax system to allow it to focus on its main goal: raising revenue.

## V. TAX EXPENDITURE LEGISLATION FRAMEWORK

This Part provides a concise overview of the current framework statutes and internal congressional rules over tax expenditures. Even though tax expenditures are regularly analyzed by Congress<sup>161</sup> it is, not surprisingly, explicitly considered in federal budget decisions. These regulatory measures prove to be ineffective in ensuring a rigorous and disciplined debate around the government’s role in allocating federal resources, which leads to ineffective, inefficient, and populist tax legislation.

As mentioned earlier, the U.S. federal government has spent \$1.16 trillion more than it has collected in fiscal year 2023, resulting in a national deficit,<sup>162</sup> however, such a deficit is not predestined but rather a politically conscious choice. Based on the Joint Committee on Taxation’s 2023 report on the tax expenditures in the U.S. tax code, the total tax expenditure in 2022 amounted to \$1.721 trillion (\$162 billion to corporations and \$1.159 trillion to individuals).<sup>163</sup>

As such, even though the foundational principle is that internal congressional rules should restrict limited tax benefits and incentives that benefit a limited population or increase capital inequality, the U.S. tax code is sometimes referred to as “a quilt filled with patches.” These patches are the result of successful lobbying initiatives that took advantage of congressional compromises, many of which were unjustified when enacted and remain even more so decades later. However, as discussed before, experience shows that a tax holiday is very difficult to repeal once enacted.

Two interesting measures were initially conceived to have a chilling effect that could have possibly been blocked because they were populist and unjustified, from an optimal tax policy point of view. First, the requirement of assessing the legislation’s full-cost budgeting and means of financing has a chilling effect because it is unlikely that the President and Congress will easily approve budgetary deficits.<sup>164</sup> Second, “tax earmarking” is a legislative chilling measure that allows recorded governmental receipts for a

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<sup>161</sup> See, e.g., STAFF OF THE JOINT COMM. ON TAX’N, A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 4 (2008); STAFF OF THE JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008–2012 1 (2008).

<sup>162</sup> See ON THE ISSUES *supra* note 103.

<sup>163</sup> Muresianu, *supra* note 114.

<sup>164</sup> One reason is the federal budget process and the Constitution make it very clear that Congress bears the responsibility and power in this case. With that power and responsibility comes public and media attention and criticism. See *Introduction to the Federal Budget Process*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/policy-basics-introduction-to-the-federal-budget-process> [<https://perma.cc/VL3A-SL5W>].

specific purpose.<sup>165</sup> This may ameliorate undesired and regressive populist legislation effects; however, it seems that these two measures are routinely disregarded by presidents and Congress, whether headed by the Republican Party or by the Democratic Party.<sup>166</sup> As a result, Congress ignores the true costs of using tax subsidies and incentives (both social and economic), which leads to inefficiency and poor tax policy.<sup>167</sup>

Generally, framework legislation applies only to new federal policies.<sup>168</sup> However, federal framework legislation is not binding but is treated as an internal rule and can be waived and ignored.<sup>169</sup> The next Section provides an overview of existing statutes and internal congressional rules concerning tax expenditures. This Section argues that these rules are ineffective or directed towards different policy objectives, rather than ensuring a thorough examination of the government's interventions in the private sector. Despite the regular publication of a tax expenditure budget, tax expenditures remain partially hidden and evade scrutiny, both within the annual federal budget and in the presentation of new revenue legislation. Additionally, the internal congressional rules that restrict tax benefit legislation are frequently disregarded.

#### A. TAX EXPENDITURES BUDGET

In March 1964, Henry H. Fowler, then-Undersecretary of the Treasury (Fowler later became Secretary of Treasury on April 1, 1965) stated that the U.S. federal tax system should raise tax revenue at the lowest tax rates possible while also enhancing equity and tax simplification<sup>170</sup>. Fowler put Stanley Surrey, then-Assistant Secretary for Tax Policy, in charge of this effort.<sup>171</sup> In a speech Surrey delivered in 1967, he introduced the terms “tax expenditure” and “tax expenditure budget.”<sup>172</sup> Surrey believed that any tax preference constructed to advance a particular goal was essentially equivalent to federal money spent advancing that same goal.<sup>173</sup>

Surrey defined these terms as “deliberate departures from accepted concepts of net income” that operated “to affect the private economy in ways that are usually accomplished by [explicit] expenditures.”<sup>174</sup>

Following Surrey's speech, the U.S. Department of Treasury published the first tax expenditure budget in 1969. However, Congress only adopted tax expenditures in 1974 when it passed the Congressional Budget and Impoundment Control Act of 1974, which defined “tax expenditures” as

<sup>165</sup> See *Carbon Tax Guide: A Handbook for Policy Makers*, WORLD BANK GROUP 121 (2017), <https://documents1.worldbank.org/curated/en/728421535605566659/pdf/129668-V1-WP-PUBLIC-Carbon-Tax-Guide-Main-Report.pdf> [<https://perma.cc/5H2G-2LBZ>].

<sup>166</sup> Edward D. Kleinbard, *Tax Expenditure Framework Legislation*, 63 NAT'L TAX J. 355, 357–61 (2010).

<sup>167</sup> *Id.* at 354.

<sup>168</sup> *Id.*

<sup>169</sup> This is the case even though such legislation passes through the regular legislative process. See *id.*

<sup>170</sup> See *Henry H. Fowler (1965-1968)*, U. VIRGINIA MILLER CNTR. <https://millercenter.org/president/lbjohnson/essays/fowler-1965-secretary-of-the-treasury> [<https://perma.cc/873M-JYNQ>]. Seiichiro Mozumi, *Tax Expenditures and the Tax Reform Act of 1969 in the United States*, 46 SOCIAL SCIENCE HISTORY 93, 98 (2022).

<sup>171</sup> Mozumi, *supra* note 170.

<sup>172</sup> See Tracey M. Roberts, *Picking Winners and Losers: A Structural Examination of Tax Subsidies to the Energy Industry*, 31 COLUM. J. ENV'T L. 63, 73–74 (2016).

<sup>173</sup> Mozumi, *supra* note 170, at 99.

<sup>174</sup> Kleinbard, *supra* note 166, at 357.

“revenue losses attributable to provisions of Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.”<sup>175</sup> The U.S. Department of Treasury also states that “[these] exceptions are often viewed as alternatives to other policy instruments, such as spending or regulatory programs.”<sup>176</sup>

Under the Congressional Budget and Impoundment Control Act of 1974, the House and Senate Budget Committees became responsible for “request[ing] and evaluate[ing] continuing studies of tax expenditures, [devising] methods of coordinating tax expenditures, policies, and programs with direct budget outlays, and report[ing] the results of such studies” regularly.<sup>177</sup> The Congressional Budget Office was assigned with preparing an annual tax expenditures report.<sup>178</sup>

However, any hope that this legislation will lead to better oversight and vetting process of the tax expenditures went away after several years,<sup>179</sup> and for the most part, tax expenditures are overlooked.<sup>180</sup>

## B. TAX EARMARKING

“Limited tax benefits,” more often referred to as “tax earmarking,” generally refer to “designating some or all of the collections from a specific tax for a specific expenditure, with the intention that the designation will continue into the future,”<sup>181</sup> but can also refer to special transition rules or other targeted tax expenditures that benefit a small or specific group.<sup>182</sup> More importantly, earmarked tax revenues follow a different route than the usual process of pooling tax revenue into a general fund and then allocating it to various government spending programs. When tax revenues are earmarked, they are directed away from the general fund, resulting in them being exempt from the ongoing review process that typically applies to general fund appropriations.<sup>183</sup>

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<sup>175</sup> Congressional Budget and Impoundment Control Act of 1974 § 3, 2 U.S.C. § 622 (1974) (amended 2019).

<sup>176</sup> *Tax Expenditures*, U.S. DEP’T TREASURY, <https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures> [<https://perma.cc/X9SY-YG66>] (updated Mar. 2023).

<sup>177</sup> Congressional Budget and Impoundment Control Act of 1974 §§ 101–02, 31 U.S.C § 1301 (1974).

<sup>178</sup> Kleinbard, *supra* note 166, at 358.

<sup>179</sup> *Id.* at 359.

<sup>180</sup> Paul McDaniel summarized this issue best, saying:

Nonetheless, the budget process [i.e., the tax expenditure budget] has not proved an effective device by which to review, control, and coordinate tax expenditures with direct spending. The review of tax expenditures has been left to ad hoc actions by tax writing committees. Tax expenditures are largely uncontrolled by the budget process because no effective limits are imposed on them. The tax writing committees are not given directions by the budget resolution as to the level of tax expenditures for a given fiscal year. Instead, the committees are given an overall revenue figure that they are to meet. But they can meet this revenue target by increasing or reducing . . . rates, personal exemptions, or the standard deduction for non-itemizers. Finally, there is virtually no coordination between tax expenditures and actions by the authorization-appropriations committees in the same budget area.

Paul R. McDaniel, *Tax Expenditures as Tools of Government Action*, in BEYOND PRIVATIZATION: THE TOOLS OF GOVERNMENT ACTION 167, 178 (Lester M Salamon ed., 1989).

<sup>181</sup> Jeremy Jackson, *Tax Earmarking, Party Politics and Gubernatorial Veto: Theory and Evidence from US States*, 155 PUB. CHOICE 1 (2013) (citing ARTURO PÉREZ & RONALD SNELL, EARMARKING STATE TAXES 1 (3d ed. 1995)).

<sup>182</sup> Kleinbard, *supra* note 166, at 360.

<sup>183</sup> Jackson, *supra* note 181, at 1–2.

After using this practice excessively in the Tax Reform Act of 1986, Congress passed the Line-Item Veto Act in 1996<sup>184</sup> to impose new procedural constraints on ear marking. The Act, requires the Joint Committee on Taxation (“JCT”) to identify earmarking,<sup>185</sup> and allows the President, pursuant to the Line-Item Veto Act, to cancel any tax earmarking.<sup>186</sup> However, the Line-Item Veto Act of 1996 was declared unconstitutional by the U.S. Supreme Court in *Clinton v. City of New York*,<sup>187</sup> because it violated the Presentment Clause of the U.S. Constitution when it granted the President the power to unilaterally revise or repeal parts of statutes that Congress had accordingly passed. As a result, in 2007, both the House of Representatives and the Senate adopted internal procedural rules aimed at identifying tax earmarking.<sup>188</sup>

A significant disparity exists between the Line-Item Veto Act of 1996 and the internal rules implemented in 2007. In the latter case, instead of relying on a nonpartisan and expert entity like the JCT to identify tax earmarking, the responsibility was shifted to self-certification by the Chairman of the House Ways and Means Committee and the Senate Finance Committee.<sup>189</sup> Since legislation typically reflects the preferences of the Committee Chair, this arrangement raises concerns and may create a situation where biased individuals are entrusted with overseeing and regulating limited tax benefits.<sup>190</sup>

### C. PAYGO LEGISLATION

PAYGO, which stands for “Pay-As-You-Go,” is a budget rule that necessitates compensating for tax cuts and mandatory spending increases by implementing tax increases or reducing mandatory spending elsewhere.<sup>191</sup> However, it is important to note that PAYGO does not apply to discretionary spending, which refers to spending determined through the appropriations process that is not subject to the same offset requirements.<sup>192</sup>

The original PAYGO policy was introduced as part of the Budget Enforcement Act of 1990, following arduous negotiations between President George H. W. Bush and congressional leaders.<sup>193</sup> This comprehensive deficit reduction package encompassed both spending cuts and tax increases.<sup>194</sup> Recognizing the need to safeguard the achieved progress, Congress sought measures to prevent future congresses from gradually dismantling the agreement.<sup>195</sup> PAYGO emerged as a crucial tool with caps on appropriations and outlays for discretionary spending programs. Budget experts widely acknowledge that PAYGO operated exceptionally well from 1990 to 1997.<sup>196</sup>

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<sup>184</sup> Line-Item Veto Act § 1, 2 U.S.C. § 691 (1996).

<sup>185</sup> Kleinbard, *supra* note 166, at 360.

<sup>186</sup> Congress could then override the President’s veto.

<sup>187</sup> *Clinton v. City of New York*, 524 U.S. 417, 421 (1998).

<sup>188</sup> Kleinbard, *supra* note 166, at 360.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 360–61.

<sup>191</sup> See *Tax Policy Center Briefing Book*, URBAN-BROOKINGS TAX POLICY CTR., (available at [https://www.taxpolicycenter.org/sites/default/files/briefing-book/background\\_1.pdf](https://www.taxpolicycenter.org/sites/default/files/briefing-book/background_1.pdf) [<https://perma.cc/LYA5-CVL6>]).

<sup>192</sup> *Id.*

<sup>193</sup> See URBAN-BROOKINGS TAX POLICY CTR *supra* note 191.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.*

<sup>196</sup> *Id.*

It effectively maintained fiscal discipline, ensuring that corresponding revenue increases or spending cuts offset any new spending or tax reductions.<sup>197</sup> However, as an unexpected budget surplus materialized in 1998, the vigilance fostered by PAYGO gradually weakened.<sup>198</sup> Consequently, the efficacy of the policy diminished, and since then, the PAYGO rules have not always been enforced properly.<sup>199</sup>

Currently, the PAYGO rules function as the sole procedural constraint on introducing new tax expenditures to the tax code or expanding existing ones. However, it is important to note that PAYGO primarily focuses on enforcing deficit-control objectives rather than guaranteeing comprehensive evaluation of new synthetic spending programs by Congress.<sup>200</sup>

## VI. CREATING A TAX DISCUSSION WITH DIMINISHED POPULIST ELEMENTS

The United States, like many other countries,<sup>201</sup> has a constantly growing national deficit.<sup>202</sup> In fact, the United States has been in some form or manner of debt since its creation,<sup>203</sup> and past studies have shown that governments are generally inefficient bodies, mostly as a result of lack of competition or alternatives.<sup>204</sup> Unfortunately, this Article does not propose a solution for that problem, but it does at least offer a way to remove certain inefficiencies that are currently built into our federal tax system.

One reason the U.S. federal tax system is inefficient is because of the lack of meaningful public discussions around our federal tax goals. The Tax Reform Act of 1986—perhaps one of the most, if not *the* most, significant pieces of U.S. tax reform legislation—was the result of the Republican Party’s wish to significantly reduce the applicable federal tax rates and the Democratic Party’s wish to broaden the federal tax base.<sup>205</sup> Indeed, at least for a few short years after the passage of the 1986 tax reform, the economy improved and became more productive.<sup>206</sup> The 1986 tax reform even achieved some tax simplification for low- and moderate-income taxpayers,

<sup>197</sup> *See id.*

<sup>198</sup> *Id.*

<sup>199</sup> TAX POL. CTR., THE TAX POLICY CENTER’S BRIEFING BOOK 30 (2022), [https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc\\_briefing\\_book-may2022.pdf](https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book-may2022.pdf) [<https://perma.cc/EH3Q-XM3C>].

<sup>200</sup> Kleinbard, *supra* note 166, at 360–61.

<sup>201</sup> *National Debt by Country/Countries with the Highest National Debt 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/countries-by-national-debt> [<https://perma.cc/34BB-RGGQ>] (last visited Sept. 20, 2023).

<sup>202</sup> *America’s Finance Guide: What is the National Debt?*, U.S. DEP’T TREASURY, <https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/> [<https://perma.cc/BXW5-6L2D>] (last updated Sept. 7, 2023); *see also* MICHAEL J. GRAETZ & ANNE L. ALSTOTT, FEDERAL INCOME TAXATION 4 (9th ed. 2022) (explaining how in 1791 the first Secretary of the Treasury, Alexander Hamilton, convinced Congress to impose federal tax on distilled spirits and carriages in order to pay for the national debt). This tax also brought upon the first Supreme Court case that considered the constitutionality of the federal government’s ability to impose taxes on the American people., *See also* *Hylton v. United States*, 3 U.S. 171 (1796) (holding that such a tax was constitutional).

<sup>203</sup> U.S. DEP’T TREASURY, *supra* note 202.

<sup>204</sup> MARCEL CÔTÉ, WHY ARE GOVERNMENT BUREAUCRACIES INEFFICIENT? A PROSPECTIVE APPROACH 1 (2012), <https://ssrn.com/abstract=2057866> [<https://perma.cc/3E3Z-JZGD>].

<sup>205</sup> *See* Julia Kagan, *Tax Reform Act of 1986: Overview and History*, Investopedia, <https://www.investopedia.com/terms/t/taxreformact1986.asp> [<https://perma.cc/8DLU-9NG9>] (last updated Sept. 11, 2023).

<sup>206</sup> GRAETZ & ALSTOTT, *supra* note 202, at 9.

but this economic improvement was quickly diminished by newly introduced federal tax legislation.<sup>207</sup>

Ever since the early 1990s, almost every administration chose to use the federal tax system as a “magic solution” for nearly every economic and social issue the administration and nation faced.<sup>208</sup> The idea that all problems—whether it is access to higher education or health insurance—could be fixed through a federal income tax credit or deduction led the federal income tax law to be over seven times longer than “War and Peace” by Leo Tolstoy.<sup>209</sup> Not to mention—it is significantly harder to comprehend.

Also, using the federal tax system to fix national problems causes another major problem: once Congress approves a tax break of any sort, it is almost impossible, from a political standpoint, to pull it back. In other words, taking away tax breaks from “the people” is not the way to get reelected. Since U.S. politicians already have been promising for years that they can fix our problems through the federal tax law system, it is not realistic to expect them to come out and say: “We were wrong, tax is too complicated to be used this way.”

To rid the U.S. tax policy of populism, legislators should focus on a much more realistic tax discussion from our politicians and media outlets. The examples in Part III are just a drop in the ocean, and many more can be found in almost any political debate. For instance, if our political representatives are asked how they will fix the problems of rising costs of higher education and the resulting limited access to education, they have two options. First, they could advocate for taxing wealthy universities and providing some form of expanded tax credit for families who send their children to college.<sup>210</sup> Second, they can explain that this is an ongoing problem that requires the federal government to reconsider its current approach and perhaps consider new solutions.<sup>211</sup>

The populist statements and promises that politicians often make are simply economically unsustainable. Indeed, free speech should not be limited. However, if the media holds politicians accountable for their statements and promises, this may very well force them to limit their populist tone. Yet, this is often out of an individual’s control, so the solution cannot depend on this. It is more important to try and address populism in our federal tax system.

The second step to tax policy reform is to focus on economic analysis and data-supported tax laws. As shown in Part IV, there are populist tax laws in our current federal tax system that are not supported by data and economic studies.<sup>212</sup> Crafting laws with clear and meaningful economic impacts that

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.* (explaining, creatively, that “Presidents and Congress have used the income tax the way a parent might employ chicken soup: as a magic elixir to solve all the nation’s economic and social difficulties.”).

<sup>209</sup> *Id.* at 9–10.

<sup>210</sup> Which are what previous administrations did, most recently in the Tax Cuts and Jobs Act in 2017. Amy Fontinelle, *How the TCJA Tax Law Affects Your Personal Finances*, (Apr. 3, 2024), <https://www.investopedia.com/taxes/how-gop-tax-bill-affects-you/> [https://perma.cc/EN2U-48KQ].

<sup>211</sup> See, e.g., Phillip Levine, *How can we fix the college affordability problem?*, THE HILL (Apr. 3, 2022 3:00 PM), <https://thehill.com/opinion/education/3262981-how-can-we-fix-the-college-affordability-problem/> [https://perma.cc/QV27-7LQB] (proposing doubling the amount of the Pell Grant to make undergraduate education more affordable for low- and middle-income students).

<sup>212</sup> See *supra* Part IV.

are supported by economic studies is crucial to reducing populism in our federal tax system.

Stanley Surrey, who coined the term “tax expenditures” and led the 1969 tax reform wrote:

[W]hy is it that in many cases legislators appear willing, with hardly any thought, to accept an expensive tax incentive program when they would just as quickly reject a similar direct expenditure program, even a much smaller one? . . . Why do they require lengthy study and analysis of direct expenditure programs before legislative and appropriation committees while they are ready to enact tax incentives on no more than generalizations and hunches?<sup>213</sup>

Surrey did not stop there and further asked, “Just why do administrators of direct expenditure programs allow tax incentive proposals to be pushed when the funds involved in such programs could be used, and probably much better used, as coordinated parts of the direct expenditure programs?”<sup>214</sup> Even today, Congress does not pay particular attention to tax expenditures when discussing tax legislation but expects an in-depth analysis for every direct investment program (also referred to as “cost-benefit calculation”), even though oftentimes tax expenditures will be much more efficient and suitable to make an impact.<sup>215</sup>

The current legislative process in Congress is straightforward: any member of Congress can introduce a bill, which in turn is then assigned to a committee for a study, and the committee may or may not hold hearings and mark up the bill (i.e., make changes to it).<sup>216</sup> Once the committee approves the bill, it is sent to the full chamber for consideration, where it will be debated and voted.<sup>217</sup> Once both chambers pass the bill, since it may be in two different versions, a conference committee is appointed to reconcile the differences, and the bill will be sent to the U.S. President who can either sign it into law, veto it, or simply do nothing.<sup>218</sup>

The committee to which the bill is assigned should be required to include an economic study by the Congressional Budget Office (“CBO”)<sup>219</sup> and the Joint Committee on Taxation (“JCT”)<sup>220</sup> that will evaluate all the budgetary

<sup>213</sup> Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 735–36 (1970).

<sup>214</sup> *Id.* at 735–36.

<sup>215</sup> *Id.*

<sup>216</sup> U.S. CONST. art. I, § 7, cl. 1.

<sup>217</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>218</sup> U.S. CONST. art. I, § 7, cl. 3. If the President decides to veto a bill, Congress can then override that veto with a two-thirds vote in each chamber.

<sup>219</sup> *Introduction to CBO*, CONG. BUDGET OFF., <https://www.cbo.gov/about/overview> [<https://perma.cc/AEP9-BQZS>] (last visited Sept. 25, 2023), the agency states:

Since 1975 the CBO has produced independent analyses of budgetary and economic issues to support the Congressional budget process. Every year, the CBO’s economists and budget analysts produce dozens of reports and hundreds of cost estimates for proposed legislation. The CBO is strictly nonpartisan; conducts objective impartial analysis; and hires its employees solely on the basis of professional competence without regard to political affiliation. [The] CBO does not make policy recommendations, and each report and cost estimate summarizes the methodology underlying the analysis.

<sup>220</sup> See *About Us: Overview*, STAFF OF THE JOINT COMM. ON TAX’N, <https://www.jct.gov/about-us/overview/> [<https://perma.cc/5Q55-XJNY>] (last visited Sept. 25, 2023) (“The [JCT] is a nonpartisan committee of the United States Congress, formed pursuant to the Revenue Act of 1926. The [JCT]

consequences of the bill, attempt to suggest alternatives to achieve the stated goals of the bill, make those studies available and accessible to the general public, and allow the committee to discuss those studies. Such a requirement will minimize the use of the federal tax system and help Congress introduce and vote on more efficient bills.

However, making the committee consider economic and budgetary studies when discussing economic bills will not have a negative impact. The assigned committee should also be required to reevaluate the bill after a fixed term of five to seven years. This review should include new and updated economic studies prepared by the CBO and the JCT on the economic impact, redistribution impact, and budgetary implications of the relevant bill. This could increase public oversight and political accountability, which would improve the efficiency of our federal tax system. Further, such an economic analysis obligation (preparation of a cost-benefit calculation) should be imposed on any tax imposed or amended. No less important, this analysis should occur for any tax expenditure at least once every decade because the economic reality changes immensely. These changes may reveal that tax expenditures that were justified and relevant decades ago are unsuitable and irrelevant today.

Additionally, using earmarking methods for all tax or tax expenditures restricts the use of governmental receipts to be redirected to lower-income households, thus reducing or even eliminating the regressivity impact and possibly increasing progressivity.

Lastly, tax policy must be focused on raising governmental revenues. As for the other two goals of taxation—redistribution of wealth and narrowing capital inequality, and taxation to better regulate taxpayers and activities—should be more narrowly tailored. Federal tax laws that focus on raising receipts should be reviewed periodically and examined for effectiveness.<sup>221</sup> However, tax laws that aim to redistribute wealth or that attempt to regulate activities should be legislated temporarily at first, unless they are legislated with bipartisan support. If the analysis report shows that this tax advances good policy and achieves its goals, these taxes should not expire.

## CONCLUSION

Populism is not going to go away anytime soon, if ever. Populism presents many challenges to the law, most of which are currently unattended. Populism in taxation presents problems with tax revenue and the efficiency and simplicity of federal tax laws. On the one hand, as a free and vibrant society, we certainly do not wish to limit anyone's right to free speech, whether it is agreed with it or not. On the other hand, populist statements cause many problems that, at this moment, the law still does not know how to face and handle adequately.

This Article suggests that one way to minimize the problematic results caused by populism in taxation is to implement a required step in the legislative process that gives the assigned committee better tools, makes the economic implications publicly available on the internet, and adds another

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includes an experienced professional staff of Ph.D. economists, lawyers, and accountants, who assist Members of the majority and minority parties in both houses of Congress on tax legislation.”).

<sup>221</sup> Whether those are in the form of S-Corporations or C-Corporations, LLCs, or other forms.



review process after a fixed term. In this regard, we hope that the economic and financial media outlets will take advantage of the enhanced process and the information available to do their job and criticize the law when criticism is due.

Tax policy discussions should also focus, for the most part, on the primary goal of taxation: raising tax revenue. This will make tax law discussions much more economically focused and economically driven and far less populist and inefficient. The tax policies aimed at redistributing wealth—including tax expenditures—and regulating taxpayers or activities should be legislated temporarily, and such tax policies should include a sunset provision that, unless revoked, would lead to the repeal of such taxes.